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Note:

Reclamation Act as used in this brief means the Act of June 17th, 1902, and reclamation law, all Federal statutes pertaining to reclamation. Other terms as used in Sec. 371, page 113, Appendix. Italics in quotations are ours.

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 266

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

MAZINE Z. FOX, ET AL

No. 267

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

PHILLIP LOUIS PARKS, ET AL

No. 268

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

JACOB F. OTTMULLER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Brief for Respondents

QUESTIONS PRESENTED

Is the United States a necessary party defendant in these suits brought against the Se-

cretary of the Interior to vacate, set aside and hold for naught certain public notices and orders promulgated by his predecessor and being enforced by him, which are not within the authority conferred upon the Secretary by, but are in positive violation of the Reclamation Act in four particulars (infra pages 60, 79, 87 and 98), override the Constitution of the United States (5th Amendment), also statutes and judicial decisions of the State of Washington?

Do these public notices and orders which were arbitrarily and capriciously made without the exercise of an honest judgment have such sanctity that they cannot be reviewed in the Federal courts under the Federal Constitution (Art. 3, Sec. 2), and vacated in the furtherance of justice without making the United States a party defendant (which it is impossible to do)?

STATUTES INVOLVED

The Reclamation Act and statutes supplementary thereto and statutes of the State of Washingon, pertinent provisions of which are set forth in the Appendix (infra pages 113 to

124) and also in Appendix to Petitioner's brief and in the argument herein.

STATEMENT OF THE CASE

The purpose of these suits is to secure a mandatory injunction commanding the petitioner, as Secretary of the Interior, to vacate, set aside and hold for naught certain public notices and orders dated October 17, 1930, February 14, 1932 and May 5, 1932 (Fox 46, 47; Ottmuller 43, 44; Parks 36, 37), promulgated by his predecessor in office and now being enforced by petitioner on the ground that the same are not within the authority conferred upon the Secretary of Interior by Congress, are in positive violation of four express provisions of the Reclamation law, three of which have been the elementary and fundamental doctrine of the right to the use of water, or water rights by appropriation since the initiation of that doctrine in the arid land states, and which deprive respondents of their "right to the use of water acquired" under the Reclamation Act, or water rights, the absolute title in fee simple being vested in them and which are appurtenant to their real property, in violation of the due process clause (5th Amendment), of the Fed-

eral Constitution, overriding the Reclamation law and contract with the Sunnyside Water Users Association, May 7, 1906, water right applications, supplemental water right contract, statutes and judicial decisions of the State of Washington, which public notices and orders were not promulgated in good faith or by the exercise of an honest judgment, but were arbitrarily and capriciously made and enforced to force and coerce the respondents and other owners of the right to the use of water from the natural flow and impounded in storage reservoirs of the waters of the Yakima River, a non-navigable stream in the State of Washington, and in the Sunnyside Valley Irrigation District, to pay $1,000,000.00 of the cost of the construction of the Cle Elum Reservoir, for the purpose of furnishing water rights to lands in other divisions, as a condition precedent to the enjoyment of the right of respondent Fox to the use of water to the extent of 4.84 acre feet, Ottmuller to the extent of 5.56 acre feet and Parks to the extent of 6 acre feet of water per acre per annum, which was determined by the Secretary of the Interior to be the measure of their water rights, prior to 1914, pur-

suant to contract of May 7, 1906, and which they have beneficially used upon their respective lands since that time.

THE FACTS

Pursuant to the reclamation law and applicable statutes of the State of Washington, the Secretary of the Interior approved a project known as the Sunnyside division of the Yakima project and the United States acquired from the Washington Irrigation Company, the Sunnyside Canal and water appropriations. As a condition precedent to the construction of reservoirs and other works, the land owners in said project were required to incorporate the Sunnyside Water Users Association and for this associtaion to enter into contract with the United States, relative to the repayment of the construction costs. The corporation was formed and on May 7, 1906, it entered into contract with the United States, which among other things, provided that if the irrigation works were constructed the association would guarantee the payment of the cost thereof to be apportioned by the Secretary of Interior (Fox and Ottmuller 12, Parks 11).

James Rudolph Garfield, the then Secretary of Interior, estimated the total costs of the acquisition of the Sunnyside Canal, water appropriations and irrigation system and the construction of reservoirs adequate and sufficient to beneficially and successfully irrigate respondents and all other lands in the division, with a view of returning to the reclamation fund the estimated cost of the project, and thereafter he determined that the construction charges for each irrigable acre of the Fox and Ottmuller land would be $52.00, and on March 2nd, 1909 issued a public notice and order fixing the charges accordingly (Fox 42, Ottmuller 34). The then owners of these lands made water right applications, in which they applied "for a water right" for irrigation of and *to be appurtenant* to respondents' lands "at the estimated costs of construction as fixed by the Secretary of the Interior, namely, the sum of $52.00 per acre; * * * that the construction charges, and each and all of said annual charges for operation and maintenance with accrued penalties *shall be and the same are hereby made a lien upon the tract of land* above described and *all water rights now or*

hereafter appurtenant or belonging thereto and with *all improvements now existing or hereafter made thereon;*" (Fox 17) "such lien or liens shall have *full force and effect of a mortgage or deed of trust* and vest in the United States all the rights and powers which might be exercised and all benefits which might be claimed by the mortgagee in a real estate mortgage given to secure the payment of a loan or debt, including the right of foreclosure by or on behalf of the United States (Ottmuller 17). The supplemental water right contract in the Parks case, of August 6th, 1907, which served as a water right application, fixed the construction charge at $10.00 per acre (Parks 15).

The United States completed the construction of the reservoir of sufficient capacity to beneficially and successfully irrigate all lands within said unit prior to August 13th, 1914, and fully complied in every particular with all contracts entered into in connection with the water rights in question, and no dispute has ever arisen between the United States and respondents relative thereto.

Prior to this time, successive Secretaries of the Interior, from information obtained by a

factual investigation and personal examination of the land and water requirements thereof made by their subordinates and representatives charged with the physical distribution of the water, pursuant to Sec. 3 of the contract between the Secretary and Sunnyside Water Users Association, of May 7th, 1906, which required the Secretary to make a determination "based upon and measured and limited by the beneficial use of water," determined that 4.84 acre feet for Fox land, 5.56 acre feet for Ottmuller land and 6 acre feet for the Parks land was necessary to beneficially and successfully irrigate the same, and based upon the information so obtained and pursuant to said contract determined said amounts to be the measure of the water rights for respondents' lands, and for more than twenty years pursuant to settled custom and practice on the project and on all other Federal projects, these lands enjoyed water rights to this extent (Fox 34, 35; Ottmuller 26, 27; Parks 26, 27).

The Reclamation Extension Act, approved August 13th, 1914 (43 USCA 469), provides *"that no increase of the construction charges* shall, after August 13th, 1914, be made, after

the same have been fixed by public notice, except by agreement." On September 24th, 1914, Franklin K. Lane, the then Secretary of the Interior, issued a public notice and order, which among other things, provides that the construction charge as fixed by public notice (Notice of Secretary Garfield, May 2, 1909, Fox 43), "shall be the amount fixed * * * and will not be increased" (Fox 35, 43; Ottmuller 28, 40). Respondents Parks and Ottmuller fully paid all construction charges and the lien therefor was released (Parks 27, Ottmuller 28). The Sunnyside Valley Irrigation District (Co-extensive with Sunnyside Division of Yakima project, Parks 12), including respondents' land, was incorporated in 1918 and it entered into contract with the United States by the terms of which the district assumed and agreed to pay all construction operation and maintenance charges, to the extent of $2,000,000.00 (Fox and Ottmuller 6, Parks 5). Thereafter the Secretary, pursuant to Act of May 15th, 1922 (43 USCA 512), released all liens on all lands in said district.

In 1930, Elwood Mead, Commissioner of Reclamation of the United States, recommended

the construction of the Cle Elum Reservoir at a cost of $3,500,000.00, for the purpose of storing water for the irrigation of lands in the Kittitas Reclamation District, then under construction, and Roza and Kennewick Divisions, the construction of which was contemplated. He estimated the cost of this reservoir to be $1,000,000.00 more than the amount which would be returned to the reclamation fund from these new divisions. After December 5th, 1924, before a new division of a project could be approved for construction, it was necessary for the Secretary to estimate the cost of construction of a new division and that it would probably return the cost thereof to the United States (43 USCA 412), and no construction could be commenced until recommended by the Secretary of Interior and approved by direct order of the President (43 USCA 413). It was necessary therefore, to make provision for said sum from some other source. Without consulting the respondents or other water users in the Sunnyside division and district, Mead charged the sum of $1,000,000.00 to said division and district, furnished the Secretary information that provision had been made for

the payment by said division or district of said sum (Fox 35, Ottmuller 26, Parks 27).

Officials of the Bureau of Reclamation attempted to persuade respondents and other water users to authorize the officials of the district to execute a contract with the United States to pay $1,000,000.00 construction charges, a portion of the cost of the Cle Elum Reservoir to be constructed for said new divisions and obligate the last faithful acre in said district to pay said sum. This amount was equivalent to an increase of about 35% of the original cost of the construction charges for respondents' lands, as fixed by Secretary Garfield in 1909. Respondents and other water users refused to authorize this contract (Fox 26, Ottmuller 28, Parks 27).

Thereafter, Mead, Commissioner of Reclamation, Stoutemyer, District Counsel, and the then Secretary of Interior, Wilbur, in order to force and coerce respondents and other water users to either authorize the district to enter into contract to pay the sum of $1,000,000.00, or to collect the same through water rental applications, caused the Assistant Secretary of Interior on October 17th, 1930, to is-

sue the basic order sought to be vacated, which among other things, changed the measure of respondent Fox water right from 4.84 acre feet, Ottmuller from 5.56 acre feet and Parks from 6 acre feet, the amount ascertained and determined by the Secretary of Interior pursuant to Sec. 3 of contract of May 7th, 1906 (Ottmuller 13), prior to August 13th, 1914, under "beneficial use" rule, arbitrarily to 3 acre feet on the Fox and Ottmuller land and 3½ acre feet on the Parks land; increased building or construction charges about 35% above the amount fixed by Secretary of Interior Garfield in 1909; struck down 1.84 acre feet of the water right from the Fox land, 2.56 acre feet of the water right from the Ottmuller land and 2.50 acre feet of the water right from the Parks land, which water rights had been beneficially used upon and were appurtenant to respondents' lands for more than twenty years, and after respondents Ottmuller and Parks had fully paid all construction charges and the lien therefor had been released, and after respondent Fox had paid all operation, maintenance and construction charges and the Sunnyside Valley Irrigtaion District had been incorporat-

ed and entered into contract assuming the payment of all charges and the Secretary had released all liens on lands in the project; and took away water rights from respondents' lands for the Kittitas Reclamation District, a new division, in violation of the property rule or maxim "first in time, first in right" which has been the law in Washington, since 1873, as declared by statute and judicial decisions of that state, which the Secretary is commanded to observe by "preserving a first right to lands" of the respondents (Fox 37, 46; Ottmuller 29, 43; Parks 28, 36).

Pursuant to this public notice and order and public notices and orders of February 19th, 1932, and May 5th, 1932 (Fox 48, Ottmuller 44, Parks 38), Fox and Ottmuller were notified that they would be deprived of all water in excess of 3 acre feet and Parks in excess of 3½ acre feet, unless they executed a water rental application agreeing to pay for all water in excess of said amounts in the following form:

"WATER RENTAL APPLICATION

"The undersigned applicant requests excess water under public notice issued by the Secretary, February 19th, 1932, and

agrees to pay applicable charges, with 6% interest from December 1st, 1932, until paid. He further agrees that water may be withheld from his land after 1932 until such charges are paid. It is understood that advance payment for excess water will be required in 1933 if the 1932 rental charge remains unpaid at that time.

Witness:..... .....

Water User."

It was agreed between the Secretary, Commissioner of Reclamation and District Counsel and the representatives of the new divisions for which the Cle Elum Reservoir was to be constructed, that an attempt would be made by means of the public notices and orders sought to be vacated, and the water rental applications, to collect from the water users in said unit and district the sum of $1,000,000.00, and if they were unsuccessful in making collection by these methods, then and in that event the new divisions for which the Cle Elum Reservoir was to be constructed, would pay the sum (Fox 37, Ottmuller 30, Parks 29).

On December 11th, 1930, the Secretary recommended for approval to the President, the

construction of the Cle Elum Reservoir at a cost of $3,500,000.00, and stated that of this amount $1,000,000.00 would be paid by rentals from the Sunnyside Division of the Yakima Project (Fox 45, Ottmuller 41, Parks 35).

The actual cost of the construction of the Cle Elum reservoir was $1,003,000.00 less than the estimated cost, made by the Secretary at the time he recommended to the President the construction of the reservoir. The new divisions have also entered into contracts to purchase additional water rights from said storage at a cost of several million dollars. On account of these facts, there is no necessity for the enforcement of the public notices and orders sought to be vacated (Fox 39, Ottmuller 32, Parks 31).

Three acre feet for the Fox and Ottmuller land and 3½ acre feet for the Parks land is wholly insufficient to beneficially and successfully irrigate the same and if respondents attempt to spread this amount of water over the whole tract, they will not have sufficient water to grow any profitable crop and the land will be completely destroyed for farming purposes,

which cannot be compensated for in an action at law (Fox 38, Ottmuller 31, Parks 30).

SUMMARY OF ARGUMENT

The purpose and essence of the reclamation law which was in force at the time of the approval of the Sunnyside division of the Yakima project by the Secretary and the construction of the storage reservoirs and irrigation system and payment by respondents of the cost thereof, was, that the United States would, after approval of the project by the Secretary, from moneys in the "reclamation fund" (43 USCA 391), provide the necessary funds to pay the entire cost of the project, including engineering expenses; that the Secretary would determine the total cost of the acquisition and construction, with a view of returning to the reclamation fund the entire cost of the project (43USCA 461); that the Secretary would then determine the cost of the project and what was known as the "building charge," and issue a public notice and order fixing the amount of such charges to be paid for each acre of irrigable land in the project (43 USCA 419); that the United States had a prior lien upon the land, together with all water rights appurten-

ant thereto and all improvements thereon for the amount so fixed, by virtue of which the Secretary was authorized, in case of the non-payment of the construction charges by the water user, to sell the land and out of the proceeds of the sale pay into the reclamation fund all moneys due, and the balance, if any, would be the property of the owner of the land (43 USCA 542); that upon full payment being made of the building or construction charges to the United States, a certificate would be issued certifying full payment of the same, and that the lien upon the land and water right was satisfied and no longer of any force (43 USCA 543); that when the payments or construction charges for a major portion of the lands irrigated from the waters of any works, in any division had been made, that the management and operation of such irrigation works, with the exception of the title to and management and operation of the reservoirs necessary for their protection and operation, *shall pass to the owners of the land irrigated and be maintained at their expense* (43 USCA 498; *that the right to the use of water to be acquired* by the water users was to be of the

character generally approved by rules, customs, statutes and judicial decisions of the arid land states, since the initiation of irrigation by appropriation and such as would absolutely insure the user in his right "and to provide that the absolute title to "the right to use of water acquired" by the water user would vest in him and that he would, by the beneficial use of the water upon his land, lay the foundation for the right which was to be inseparable from the lands irrigated, the act provided: "The *right to the use of water acquired* under the provisions of the reclamation law *shall be appurtenant to the land irrigated,* and *beneficial use shall be the basis, the measure* and *the limit* of *the right.*" (43 USCA 372).

During the time of the construction of the reservoirs in question, Congress authorized the Secretary of the Interior to enter into contracts for surplus stored water not needed for the water rights to irrigate lands under irrigation, which expressly required the Secretary to preserve a *first right* to lands under irrigation (43 USCA 523), and after completion of reservoirs and irrigation system, restricted the increase of construction charges after the same had

been fixed by public notice, except by agreement (Reclamation Extension Act, August 13, 1914, 43 USCA 469). The Sunnyside Valley Irrigation District was incorporated in 1918 and pursuant to the reclamation law (Act of May 15, 1922, 43 USCA 511), entered into contract with the United States, by the terms of which said district agreed to pay all construction, operation and maintenance charges, and the Secretary released all liens for construction, operation and maintenance charges in favor of the United States, contained in the water right applications and supplemental water right contract (43 USCA 512).

The Yakima River, the source of the natural flow and impounded waters, the right to the use of which, or water rights, are involved in these suits, is a non-navigable stream. The United States waived its rights to the government and control of the waters of this stream (43 USCA 661) and by Section 8 of the Reclamation Act (43 USCA 383) recognized that the right to control, appropriate, use and distribute the waters was vested in the state, and the United States, in the construction of this project, acted solely under and subject to the ap-

propriation and irrigation laws of the State of Washington (State of Nebraska vs. State of Wyoming, 295 U. S. 40, 42).

The United States, in the acquisition of the Sunnyside Canal, water appropriations (1,000 cubic feet of water per second of time appropriated by Northern Pacific Yakima and Kittitas Water Company on April 22, 1891); construction of reservoirs and irrigation system, was acting for the water users in the project (designated as shareholders in contract between the Secretary and Sunnyside Water Users' Association, of May 7, 1906), the predecessors in title of respondents; that under the express terms of the Reclamation Act, the only right which is provided for is *"the right to the use of the water acquired"*; that a condition precedent for the enjoyment of this right was the "beneficial use" by the predecessors in title of the respondents upon the lands now owned by respondents, for the act states: *"beneficial use shall be the basis * * * and the limit of the right,"* which of course, means that the actual use of the water upon the land for agricultural purposes is the foundation of, and that no right exists without such use of the

water and when it was so used upon respondents' lands, it became the most valuable part thereof, and in the words of the act "appurtenant to" their lands, and that without the actual application of the water to these lands, the predecessors of the respondents acquired no "right to the use of the water" but upon the *beneficial use* by them, they *acquired* title to *"the right to the use of water,"* or in the language of the statutes and judicial decisions, completed the appropriation of the water and acquired a water right to the extent that it was necessary for the purpose of irrigating their lands for agricultural purposes to the full extent of the soil, for the Act gives the yardstick to be used in measuring the water right to be acquired, and expressly provides that *"beneficial use shall be * * * the measure * * * of the right,"* and also refers to *"the right * * * acquired,"* which of course, means that all and the only right which was contemplated by the act vests in the respondents, which right was acquired, not by purhcase from the United States, but under and pursuant to the statutes and judicial decisions of the State of Washington.

All that the United States did was to advance the necessary funds to pay the construction costs of the arificial means (reservoirs and irrigating system), so that respondents might enjoy this right, and as security for all funds so advanced, the predecessors in title of the respondents executed liens in the nature of mortgages upon respondents' lands and water right appurtenant thereto, which the respondents Ottmuller and Parks have fully paid, and the lien held by the United States was released, and after the execution of a contract by the Sunnyside Valley Irrigation District with the United States whereby it agreed to pay all construction, operation and maintenance charges, the Secretary of the Interior released all charges on all of the lands, including the Fox land. There is not one word in the Reclamation Act that intimates that the United States has authority to lay the foundation upon which the right contemplated by the Act is founded. The purposes of the act was to make it possible for the United States to advance the costs of construction of a project and that the United States would have a mortgage upon the lands and water rights in the project for the estimated

cost, as fixed by the Secretary of the Interior, and that when the construction charges on a major portion of the lands had been paid, the management and operation of the irrigation system should pass to the owners of the land irrigated and would be maintained at their expense.

The foregoing construction is clearly evidenced by the terms of the contract between the Sunnyside Water Users' Association and the United States, May 7, 1906 (Fox and Ottmuller 12, Parks 11), which recites that the respondents *"must initiate the rights to the use of the water* from said proposed irrigation works * * *, which *right shall be* and thereafter continue to be *forever appurtenant* to the designated lands" of the respondents. The water right application provides that "the applicant hereby *applies for a water right* * * * to be used for the irrigation of, and *appurtenant to"* respondents' lands and provides that the United States shall have a lien in the nature of a mortgage upon the land and *"all water rights now or hereafter appurtenant or belonging thereto* and all improvements now existing or hereafter made thereon" and pro-

vides for non-forfeiture of the right acquired after full payment (Fox 16, 17, Ottmuller 16, 17), pursuant to the terms of the Act (43 USCA 431).

The reclamation law, contract with the Sunnyside Water Users' Association, water right applications and supplemental water right contract are all in harmony with the territorial laws, Constitution of the State of Washington, statutes and judicial decisions of that state and which were the law of that state at the time of the making of the water appropriations, construction of the reservoirs and irrigation system for respondents' lands. The territorial legislature by act approved November 13th, 1873 (Session Laws 1873 p. 520) provided that beneficial use of the water was the basis and the measure of the right. This act remained the law with reference to respondents' rights until the same were re-enacted in the Water Code in 1917 (Session Laws, 1917, Chap. 142, Sections 1, 31, and 39). The courts have repeatedly held that where a water right for irrigation was acquired it did "become a part of the land" (Ament vs. Bickford, 139 Wash. 494, 495), and was appurtenant thereto (Geddis vs.

Parish, 1 Wash. 587, Tedford vs. Wenatchee Reclamation District, 127 Wash. 495, 499); that "the right to the flow of water to be used upon land, whether in its *natural state* or *through pipes from a reservoir* * * * for the use upon the lands are considered appurtenant to the land and therefore realty" (Madison vs. McNeal, 171 Wash. 669, 675, 676); that "it is an elementary principal of the law of appropriation of the waters for irrigation, that the first appropriator is entitled to the *quantity of water appropriated* by him" and that, "where a valid appropriation is made, *the right*, according to all the authorities, becomes vested" (Longmire vs. Smith, 26 Wash. 439, 447); that under the law as it existed when the water was first beneficially used upon respondents' lands, the right to the use of the water or water right was acquired without any other procedural requirements (In re waters of Crab Creek and Moses Lake, 134 Wash. 7, 14, 15); that when "this right is being trespassed upon, the owner thereof should be protected from such acts" (Ament vs. Bickford, 139 Wash. 494, 495).

The title to and management and operation

of the reservoirs and the works necessary for the protection and operation is in the Government, but the ownership of the waters impounded therein and the title to those waters are vested in the public or state and the only right that can be acquired by anyone (including the United States, which have no greater rights than a private individual or corporation, Chap. 88, Session Laws of 1905) in and to those waters for irrigtaion purposes, under the law of the State of Washington as provided by the Constitution, legislative enactments and judicial decisions and by Section 8 of the Reclamation Act (43 USCA 372) is by the "beneficial use * * * of the water acquired" upon the land for agricultural purposes and when the water is so applied, the title to "the right to the use of water acquired" is in him who applies the water to such use.

The foregoing rule and the reason for the rule was clearly stated by the court in Proctor vs. Sim, 134 Wash. 606, 614, where the question at issue was the ownership of the waters of Duck Lake, a non-navigable lake, where the bed and land surrounding the lake was owned by an individual, the court after reviewing the

statutory and constitutional provisions and the Water Code, gave the rule and the reason for the rule in the following language:

> "This declaration to the effect that all waters within the state belong to the *public is but an echo of legislative enactments which have existed in this state for many years, as we will later show.* When it is considered that a large portion of this state is arid and that its growth and development depend greatly upon the use of the waters on the lands therein, *it was most natural that the state from the beginning should have laid claim to the waters within its boundaries, in order that it might facilitate the reclaiming of its arid lands.*

The Secretary of the Interior is authorized to carry out the provisions of the reclamation law. No authority is, or could be, conferred upon him to issue public notices and orders overriding the Constitution of the United States, acts of Congress, statutes and judicial decisions of the State of Washington. Respondents take the position that the acts of the Secretary of the Interior in issuing, and the acts of the petitioner in enforcing the public notices

and orders sought to be vacated, was an invasion and trespass upon their property rights and that the petitioner should be restrained, whether he professes to be acting for the government or not. Neither the petitioner nor the Government he represents could trespass upon the property of the respondents. By reason of their illegality, the petitioner's acts in the enforcement of the public notices and orders are personal and derive no official justification from his doing them in asserted agency of the Government. There is a difference between an injunction against the illegal seizure of the property rightfully possessed and against the cancellation of a contract which involves no change of the possession. The Government is not responsible for the wrongs of the petitioner in the enforcement of these orders and the only relief that can be obtained is by these suits for the Government could not be made a party defendant and there is no relief under the Tucker Act, for there is involved no breach of contract by the United States.

ARGUMENT

THE SUBJECT MATTER OF THESE SUITS IS "THE RIGHT TO THE USE OF THE WATER ACQUIRED" BY RESPONDENTS FROM THE NATURAL FLOW AND IMPOUNDED WATERS OF THE YAKIMA RIVER, COMMONLY KNOWN AS WATER RIGHTS, WHICH RIGHTS ARE VESTED IN RESPONDENTS AND THEREFORE THEY INVOLVE NEITHER CONTRACTS WITH, NOR PROPERTY INTERESTS OF THE UNITED STATES AND IT IS NOT A NECESSARY PARTY DEFENDANT.

Government counsel for petitioner have referred to the *corpus of the water* and the *right to the use of the water acquired,* by respondents, as synonymous terms, and take the position that these suits are based solely upon executory contracts for the sale by the United States and purchase by the respondents of the *corpus of the water,* which is *owned by the United States,* for counsel state:

> "By virtue of these water right applications and contracts, respondents' predecessor became entitled to receive *designated amounts of water* from the

United States under specific conditions." (Pet. Br. p. 4).

"In substance and effect suits to compel *specific performance of the contracts* to which the United States is a party and to *affect property in which it has an interest.*" (Pet. Br. p. 9).

"It is plain that under the statutes and decisions of Washington, which cover the appropriation of waters now in question, that the *United States in storing* and distributing the water, *is the sole owner and appropriator of the water* and that the *respondents have no right to the water* apart from the contract obligations of the United States." (Pet. Br. p. 10).

"These suits seek relief against the petitioner, which amounts to a mandatory injunction that the petitioner deliver to the respondents the same *amount of water* as was delivered prior to the completion of another division of the Yakima Reclamation Project." (Pet. Br. p. 11).

"The respondents, we believe, *have no rights* whatever apart from their contracts with the United States. In asserting a *property right in the water* re-

spondents lay claim to *property claimed by and in the possession of the United States.*"

"It seems clear that respondents have no claim whatever save that which rests upon the *contracts with the United States, the sole appropriator and owner of the water rights.*" (Pet. Br. p. 28).

"But also seek to interfere with the operation and management of the reservoirs and distribution system of the United States." (Pet. Br. p. 32).

Based upon these premises they have reached the conclusion that these suits relate to the natural flow and impounded waters of the Yakima River, which is the property of the United States and that such suits are based solely upon executory contract for the sale by the United States and purchase by respondents of *water,* therefore, it is an indispensable party defendant and these suits must be dismissed, which if granted by this court, means that there is no judicial forum where these illegal and void orders, which were arbitrarily and capriciosuly promulgated and enforced without the exercise of an honest judgment, to coerce and force the respondents and other

water users in the Sunnyside Division to pay $1,000,000.00 of the costs of the construction of the Cle Elum reservoir, to furnish waters for new divisions, in positive violation of four express provisions of the reclamation law, can be reviewed or vacated in furtherance of justice, and that the respondents, as owners of "the right to the use of the water acquired under the provision of the reclamation law" have no rights which the petitioner must respect and which he cannot destroy by an edict in the form of a public notice and order, which, of course, means that if petitioner has the power to deprive respondents of 40% of their rights to "the use of water acquired under the reclamation law," then he can deprive them of 100% of their rights and can also deprive other water user on the Sunnyside division and on every other Federal reclamation project of 100% of their rights to the use of water acquired under the act, destroy their land for farming purposes, for the land without water has no value, the security upon which the respondents and other water users depend for their livelihood and upon which security millions of dollars have been loaned by the Federal Land

Bank and Land Bank Commissioner to the individual farmer and on which millions of dollars have been loaned by the Reconstruction Finance Corporation to irrigation and drainage districts, destroy the value of the property in the cities and towns that have grown up as the result of "the use of the water" upon the arid and valueless land, destroy the hope of a livelihood of the tillers of the soil, who have, by the sweat of their brow, carved out of the great American Desert, their farmsteads in which they have invested their life savings and the fruit of years of toil, dirve them from their homes with their hopes and aspirations and faith in their Government blasted, which would be one of the saddest pictures in the history of the development of the West.

There is no breach of the contract between the United States and the respondents upon which to base a suit under the Tucker Act, for the United States, by the construction of the reservoirs of adequate capacity to store sufficient water to beneficially and successfully irrigate respondents' lands and all other lands in the division has fully complied with all contract obligations and the respondents Ottmuller and

Parks, having fully paid the United States their proportionate share of the costs as fixed by the Secretary, pursuant to the reclamation law, and the Secretary having released all liens upon the Fox land for construction, operation and maintenance charges after the Sunnyside Valley Irrigation District entered into a contract with the United States in 1918 by the terms of which it assumed and agreed to pay all charges, the government has no lien upon the Fox land. The United States is not suable in an action of this nature and even if it had consented to be sued, there is no basis for an action against it. The promulgation and enforcement of these orders and notices are personal and derive no official justification for the petitioner enforcing them in asserted agency of the government, and for this reason no suit would lay against the United States, even if Congress had authorized suit of this nature to be brought.

Section 8 of the Reclamation Act (43 USCA 372) describes the subject matter of these suits in the following language: "*The right to the use of water acquired* under the provisions of the reclamation law." The contract between

the Sunnyside Water Users' Association and Secretary of May 7, 1906 (Fox and Ottmuller 12, Parks 11), used the following language with reference thereto: "must initiate *rights to the use of water* from the said proposed irrigation works * * * applicants *for the right to the use of water* * * * the *rights* of the members of the association *to the use of the water* where the same have vested." The water right application provides that the applicant "applies for a *water right*" (Fox and Ottmuller 16). The same provisions are contained in the supplemental water right contract in the Parks case, for it provides that the contract shall serve for the purpose of a water right application (Parks 17).

The Washington Territorial Legislature, Act November 13, 1873 (Session Law of 1873, p. 520, Sec. 1) defines it as the right "to the use and enjoyment of the waters of the streams and creeks." The State Constitution, adopted in 1889 (Art. 21, Sec. 1), defines it as "the use of the waters of this state." The first legislature (Session Laws, 1889-90, p. 706) defined it as the right "to take from any natural stream or lakes of this state," and the Act of 1891 (Laws

of 1891, p. 327, Sec. 1) upon which the petitioner relies, defines it as "the right to the use of the water." The Water Code, the last Legislative expression (Session Laws 1917, Chap. 117), defines it as "any right thereto, or to the use thereof."

The courts have referred to this as "the right to the use of water" (Miller vs. Lake Irrigation Company, 17 Wash. 447, 451; Benton vs. Johncox, 17 Wash. 277, 290; in re Waters of Crab Creek and Moses Lake, 134 Wash. 7, 12, 13) and also "the right to the flow of water" (Madison vs. McNeal, 171 Wash. 669, 675) and in conveyances and common use it has been referred to as a "water right" (Geddis vs. Parish, 1 Wash. 587, 591; Ament vs. Bickford, 139 Wash. 494, 495; Madison vs. McNeal, 171 Wash. 669, 675, 676); and this court in reviewing the law of the water rights as established by local rules and customs and the legislation and judicial decisions of the arid land states, referred to it as "the right to the use of water." (California Oregon Power Company vs. Beaver Portland Cement Company, 295 U. S. 142, 147).

From the foregoing it is evident that the subject matter of these suits is *"the right to the*

use" of the natural flow and impounded waters of the Yakima River acquired by respondents and their predecessor in title *"under the provisions of the reclamation law,"* pursuant to the appropriation and irrigation laws of the State of Washington (State of Nebraska vs. State of Wyoming, 295 U. S. 40, 42). The most satisfactory definition that I have found of a water right is given by Judge Phillips in Murphy vs. Kerr, 296 Fed. 536, 541, as follows:

> "The right to divert water from a natural stream by artificial means and apply the same to some beneficial use."

The water rights in question were acquired by appropriation. The clearest statement that I have found as to what is necessary in order to make an appropriation of water is given in Simons vs. Inyo Cerro Gordo Mining Company, 192 Pac. 144, as follows:

> "To constitute a valid appropriation of the water, three elements must always exist, first, an intent to apply it to some existing or contemplated beneficial use, second, an actual diversion from the natural channel by some mode sufficient for the purposes, and third, an applica-

tion of the water, within a reasonable time, to some beneficial use."

The foregoing definitions quite accurately give the necessary elements in order to acquire by appropriation water rights according to the legislation and judicial decisions of the arid land states, and as I will point out, are recognized in the Reclamation Act and the rules and regulations promulgated under which the predecessors in title of the respondents acquired the water rights which are the subject of these suits.

The water right is a completed appropriation of "the right to the use of water," nevertheless, the last element in the description of an appropriation of the water and in the definition of a water right is the same and meant in these suits, the actual application of the water upon the land by the predecessors in title of respondents more than twenty years ago for agricultural purposes. The State of Washington is the only party that could contest the validity of the water appropriations upon respondents' lands and that contest could only be upon the ground that respondents are not beneficially using the water thereon for agricultural pur-

poses. The fact that respondent Fox, to the extent of 4.84 acre feet, Ottmuller to the extent of 5.56 acre feet and Parks to the extent of 6 acre feet, have used this amount of water beneficially upon their land for agricultural purposes in the raising of crops, is admitted (All the allegations of amended bills are admitted by motions to dismiss, Ickes vs. Virginia-Colorado Development Co., 295 U. S. 639, 646). There is no suggestion in the record that the state is contesting the respondents' rights.

The first element necessary to make a valid appropriation, "an intent to apply to * * * beneficial use," could not be accomplished by the United States under the Reclamation Act, for it does not authorize the Secretary of the Interior to engage in the irrigation of lands for agricultural purposes on the part of the United States. This being true, any act of the Secretary of the Interior in connection with the acquirement of the respondents' water rights was for the respondents and not for the United States. It was the intent of respondents' predecessors in title to apply the water to a beneficial use. This fact is evidenced by the provision in the contract between the Sunny-

side Water Users' Association and Secretary of the Interior, May 7, 1906, wherein they were required "to initiate rights to the use of water from said proposed irrigation works, to be constructed by the Secretary of the Interior as soon as such rights may be initiated, and thereafter complete the acquisition thereof" (Fox and Ottmuller 13, Parks 11). By this provision respondents' predecessors in title were required to initiate, that is, declare their intent to apply the impounded waters for agricultural purposes upon their lands and to "complete the acquisition" of the water rights by the beneficial use of the water upon their lands for agricultural purposes.

It is evident that the intention to apply the natural flow and impounded waters of the Yakima River and the actual application of the same for beneficial use in the irrigation of respondents' lands for irrigation purposes was never conferred upon the United States by Act of Congress, and that it was necessary for the respondents' predecessors in title and respondents in order to enjoy these rights to comply therewith.

Under the law of the State of Washington as

construed by the courts of that state (in re Waters of Crab Creek and Moses Lake, 134 Wash. 7), the court expressly held that a water right could be acquired by the beneficial use of the water upon the land without the compliance with the precedural requirements of the statute law of the State of Washington (Session Laws 1891, p. 327), and also held that this right became vested as soon as the water was beneficially used upon the land (Longmire vs. Smith, 26 Wash. 439, 447).

Government counsel take issue with the holding of the eminent and able Justice Van Orsdel, in the following statement made by him in the opinion in the lower court:

> "It is settled irrigation law that mere diversion and storage of water does not constitute an appropriation. Before there can be an appropriation the water must be applied to a beneficial use. Highland Ditch Company v. Union Reservoirs Company, 127 Pac. 1025. In Paine Irrigation District v. Board of Commissioners, 236 Fed. 790, the court, considering constitutional and statutory provisions similar to those of the State of Washington, held that under the Constitution and

> statute relating to water rights, as construed by the Supreme Court of the State, no property right can be acquired in the use of water until it is applied to a beneficial use. The owner of the carrying ditch gets no title or right to the use of the water and has no property in it subject to disposal, but such property right of disposal is in him who applies the water to beneficial use," (Parks 50).

and take the position that the law of Colorado is different from the law of Washington, and for that reason, the court was in error, when it stated that the "constitution and statutory provisions similar to those of the State of Washington" are in force in Colorado.

Section 5 of Article 16 of the Colorado Constitution declares that the waters of every natural stream is the property of the public, which is the identical construction placed upon the Washington constitution (Art. 21, Sec. 1) and statutes of the State of Washington (Session Laws 1891, p. 327) by the Supreme Court of that state (Proctor vs. Sim, 134 Wash. 606); and Sec. 6, Art. 16 of the Colorado Constitution provides "that the right to divert non-navigable waters of any stream for beneficial use shall

never be denied. Priority of the appropriation shall give the better right, as between those using the waters for the same purposes." The foregoing is but a summary of the irrigation and appropriation laws of the Territory of Washington (Laws 1873, p. 520), which were continued in force by Sec. 24 of the Enabling Act (Vol. 1, p. 343, 344, Rem. Rev. Stat.) and page 94 of the Session Laws of 1889-1890, and the subsequent enactments (Session Laws 1891, p. 327) and re-enacted in Water Code (Session Laws 1917, Chap. 117), and conclusively prove that the statement made by the lower court was upon constitutional and statutory provisions similar to those which were in force in the State of Washington at the time of the appropritaion of the waters and construction of the reservoirs in which the same were impounded, therefore the authorities cited and the rule stated, are directly in point.

The foregoing is supported by the conclusion reached in a comprehensive and carefully considered decision by this court of certain elementary and fundamental rules in connection with "the right to the use of water" or water rights in the arid land states in the case of Cal-

ifornia Oregon Power Company vs. Beaver Portland Cement Company, 295 U. S. 142, 155, 157, when the court stated:

> "The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of *appropriation for a beneficial use*, as recognized by local rules and customs and the legislation and judicial decisions of the arid land states, *as the test and measure of private rights* in and to the non-navigable waters of the public domain. Jones vs. Adams, 19 Nev. 78, 86, 6 P. 442, 3 Am. St. Rep. 778; Jacob v. Lorenz, 98 Cal. 332, 335, 336, 33 P. 119."
>
> "In respect of the area embraced by the desert land states, with the exception of a comparatively narrow strip along the Pacific seaboard, it had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region *depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water.*"

The foregoing statements are amply sup-

ported by the judicial decisions of the arid land states, where the questions involved have been under consideration by the courts, save and except in California where by the constitution of 1879 and 1911, water could be appropriated for sale, and the following are some of the decisions which support the rule: Rock Creek Flume and Ditch Company vs. Miller, 93 Mont. 248, 89 A. L. R. 200, 203, 204; Custer vs. Missoula Public Service Commission, 91 Mont. 136; Verworf vs. Lowe, 75 Mont. 571; Salt Lake Water Company vs. Salt Lake Power Company 61 L. R. A. 648, 659; Madison vs. McNeal, 171 Wash. 669, 670, 675; Proctor vs. Sim, 134 Wash. 606, 615. Statements in Dunsmuir vs. Port Angeles Gas Company, 24 Wash. 104, 114, and in Methow Cattle Company vs. Williams, 64 Wash. 457, 460, are merely dictum, having been expressions of the court upon a point not involved in the opinion, and, therefore, do not come within the rule of stare decisis (Humphries Executors vs. United States, 295 U. S. 602, 626). The other Washington authorities cited do not touch the questions involved.

The foregoing was recognized by the House Committee in its report upon the bill when

the only right provided for was "the *water rights* acquired under the provisions of the act shall be * * * *founded on* and limited by *beneficial use*" and in the act itself, which provides "*beneficial use shall be the basis* * * * *of the right* * * * to the use of water acquired under the provision of the reclamation law *.

The second element necessary to make the appropriation, according to the definition, was "an actual diversion from the natural channel by some sufficient mode, sufficient for the purposes" and in definition of a water right "by artificial means." The Reclamation Act was enacted for the express purpose of providing the artificial means sufficient to take the water from the natural stream or channel by some sufficient mode so that the water user could beneficially apply the same upon his land for agricultural purposes.

Pursuant to the terms of the act, the Secretary of the Interior in the instant cases, approved the Sunnyside division of the Yakima project, acquired the Sunnyside Canal and water appropriations from the Washington Irrigation Company, constructed reservoirs of suffi-

cient capacity to impound the necessary waters and constructed the irrigation system of sufficient capacity to furnish "the use of water acquired" by respondents under and pursuant to the irrigation and appropriation laws of the State of Washington, for the purpose of irrigation and making their "said land available for agricultural purposes to the full extent of the soil thereof," which the Secretary of the Interior, prior to 1914 determined pursuant to Section 3 of the contract between the Sunnyside Water Users' Association and the Secretary of May 7, 1906 to be 4.84 acre feet for the Fox land, 5.56 acre feet for the Ottmuller land and 6 acre feet for the Parks land. The Secretary ascertained that the amount required to return to the reclamation fund the total cost to the United States would be $52.00 per acre for the irrigable land of the class of Fox and Ottmuller and $10.00 per acre for a supplemental water right to the class of lands of Parks, and pursuant to the Act fixed these sums, and issued a public notice as to the Fox and Ottmuller land, stating that the construction charges would be $52.00 per acre. Thereafter the predecessor in title of the Ottmuller

and Fox entered into water right applications by the terms of which the then owners agreed to pay these amounts of construction charges and that the United States had a lien on the land, water right then or thereafter to become appurtenant and all of the improvements thereon or thereafter placed thereon, as security for the payment of this amount, which was in the nature of a mortgage or deed of trust, with authority in the Secretary of the Interior to sell the land for non-payment, paying all sums due to the United States into the reclamation fund and the remainder, if any, to be the property of the owner of the land. Respondents Ottmuller and Parks fully paid all construction charges and the lien was released and satisfied. The Sunnyside Valley Irrigation District was incorporated under the laws of the State of Washington, and in 1918 it entered into contract with the United States, by the terms of which it assumed and agreed to pay all construction, operation and maintenance charges. Thereafter the Secretary released all liens upon the Fox land and all other lands in the district.

Certainly it was not the intention of Con-

gress as expressed in the Reclamation Act, nor of the contract between the Secretary and the Sunnyside Water Users' Association, water right applications or supplemental water right contract that the United States had title to either the water or water rights, for if it was the intention that the United States had acquired and would retain title to the water, or acquired title to the water right, then the act, contracts and water right applications made pursuant thereto would not have required the execution by the predecessors in title of the respondents of a mortgage upon respondents' lands and the water rights appurtenant thereto. The water without the land had no value and the land without the water had no value. "The right to the use of water acquired" by respondents gave value to their lands. A lien in the nature of a mortgage upon these lands with the water right appurtenant thereto and all the improvements placed thereon by respondents and their predecessors in title gave the maximum protection to the United States for all moneys advanced by it pursuant to the terms of the Reclamation Act.

The premise upon which the government

counsel rely and in particular when they make the following statements: "the United States in storing * * * water, is the sole owner and appropriator of the water * * * respondents have no rights to the water apart from the contract obligations of the United States * * * the United States, the sole appropriator and owner of the water rights" is fully and completely answered in the case of Ament vs. Bickford, 139 Wash. 495, in which case the predecessor in title of Ament purchased from the predecessor in title of Bickford, a parcel of land, together with a perpetual right to an amount of water definitely measured. After many years' observance and in 1925, Bickford interfered with Ament's rights and "destroyed the water connections and shut off the supply" the court said: "the appellant (Ament) bought a *water right* which was intended to, and which *become a part of the land. This right* is being trespassed upon, and the appellant should be protected from such acts. Justification for the judgment (of the trial court, which was reversed) is sought in the argument * * * that the covenants are merely personal. The *contract did more than*

create covenants; it transferred property." The claim was made that the contract was void and unenforceable, and *"that the water owned by the grantor* was subject to regulation by the Public Service Commission. No merit is found in this claim *for the purchase was not of water from a water system, but of a certain definite water right.*" Dickinson vs. Dick, 151 Pac. 441, is directly in point, in which case the court held that the contract was not executory but executed and that the title to the water right passed to the purchaser.

The fact that Secion 6 of the Reclamation Act provides "that the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress" is wholly immaterial on the issues involved, for the property right of respondents to *"the use of the water acquired under the reclamation law,"* or the water right, is separate and distinct from the property right in the reservoirs and works necessary for their protection. Murphy vs. Kerr, 296 Fed. 536, 544; Snow vs. Abalos, 18 N. Mex. 681, 140 Pac. 1044, 1048.

This question was squarely before the court in Proctor vs. Sim, 134 Wash. 606, where the court held that the ownership of the bed, shores and land surrounding a non-navigable lake did not confer ownership in the waters of the lake. Proctor, the owner of the bed, shores and land surrounding Duck lake, brought suit against Sim to recover *"for the value of water"* taken from the lake by Sims by means of a pumping plant to irrigate an orchard on Sim's land which did not border on the lake. The court denied recovery for the value of water taken by Sims for the reason that Proctor did not own the water of the lake but that the title to the same was in the state, and after referring to the constitutional and statutory provisions gave the reason why Proctor did not own the water of the lake, as follows:

> "When it is considered that a large amount of this state is arid and that its growth and development depend greatly upon the use of the waters on the lands therein, it was most natural that the *State* from the beginning should have *laid claim to the waters* within its boundaries, in order that *it might facilitate the reclaiming of its arid lands.*"

The cases of United States vs. Union Gap Irrigation Company, 209 Fed. 274, West Side Irrigation Company vs. United States, 246 Fed. 212, and Ide vs. United States, 263 U. S. 497, cited and relied upon by the petitioner, are in harmony with the theory of the respondents. United States having made certain water appropriations for *"the reclamation and cultivation of all the lands within the project"* in the Ide case, which of course meant for the benefit of the owners of those lands, for it was not the intention of the reclamation law that the United Sates would actually engage in the reclamation and cultivation of the land, but that this would be done by the owner of the land for whom the appropriation was made by the United States. Certainly the owners of the land in the projects for whom the appropriations were made in the cited cases had certain rights which they were entitled to protect as against hostile claims by third parties. The United States having the right to make the appropriation for the land owners certainly had the right to protect the same against the claims of the third parties. The United States also had the duty in Ide case, to protect the appropria-

tion "*for reclamation and cultivation of all the lands within the project*" for which lands the appropriation was made, and in so doing, protect the individual water user on the project for whom it was acting. There is another reason why the United States was directly interested. It had advanced the funds with which to construct the project and had accepted a lien in the nature of a mortgage upon all the irrigable land within the project and "the right to the use of the water acquired" by the water users in those projects as security for the moneys so advanced by it. The land without the use of water had no value. The security upon which the United States advanced the money to construct the project was "*the right to the use of the water acquired*" by the water users in those projects. This right was dependent upon the appropriation made by the United States for the water users, against which the hostile claims of third parties were asserted in each of the above cases.

The natural flow and impounded waters of the Yakima River is not respondents' property; but their rights to use that water, based upon the appropriation made by the Northern Paci-

fic, Yakima and Kittitas Irrigation Company, on the 22nd day of April, 1891, subsequent appropriations made by the United States for them, based upon their beneficial use of the water for agricultural purposes is a property right (Johnston vs. Little Horse Creek Irrigation Company, 13 Wyo. 209, 110, Am. St. Rep. 986, 992) and as such is entitled to protection (Ament vs. Bickford, 139 Wash. 464, 465; California Oregon Power Company vs. Beaver Portland Cement Company, 215 U. S. 142, 154). No hostile claim to those water appropriations are waged in these suits. If the Kittitas Reclamation District were before this court asserting its right to the use of the water which was appropriated for respondents' lands, then a similar issue would be involved. The trial court correctly stated the purpose of these suits, as follows:

> "That the orders made by the defendant are not authorized by Congress, and had they been so authorized would have deprived the plaintiffs of vested rights. The suits are not brought against the United States, but to set aside unauthorized acts of the defendant in cases in

which he has no discretionary powers and is acting arbitrarily." (Parks 23).

The case of State of Arizona vs. State of California strongly relied upon by government counsel is upon entirely different facts from those in these suits and entirely different legal questions are raised. The pivotal point upon which the decision that the United States was a necessary party, rested, is found in the following statement by the court: "The Colorado River is a navigable s t r e a m of the United States. The privilege of the states through which it flows and the inhabitants to appropriation and use of the water, subject to the paramount power of the United States to control it for the purpose of improving navigation." That suit involved the corpus of the water of a navigable river and among other things the relief asked was "that the quantum of Arizona's equitable share of the water flowing in the Colorado River, subject to diversion and use, be fixed by this court, and that petitioner's title thereto be quieted" and sought "in advance of any act of appropriation" either by her citizens or by the state to partition the waters, for the court said: "The decree sought

has no relation to the present use of the water thus impounded which infringes rights which Arizona may assert subject to the superior but unexercised powers of the United States." It is evident that the suit referred to the corpus of the water of the Colorado River, a navigable stream, and to partition the waters between the State of Arizona and State of California, subject to the paramount right of the United States in and to those waters, where the state of Arizona as a sovereign state or her citizens had no present rights in and to the unappropriated waters of the Colorado River. Title to vested water rights were not involved. The Arizona case does not touch the issues involved in these suits in the slightest degree and to extend the doctrine that the United States has the paramount right over the navigable waters to waters from non-navigable streams impounded in reservoirs pursuant to the terms of the Reclamation Act would mean the overriding of Sec. 6 of that act (43 USCA 383) and also over-ruling the decision of this court in the case of State of Nebraska vs. State of Wyoming, 295 U. S. 40, 42, and also the fundamental and elementary doctrine of water

rights, which are embodied in legislative enactments and judicial decisions of the State of Washington.

The purpose of the suit in the American Falls Reservoir District No. 2 vs. Crandall, 82 Fed. (2nd) 973, was to require the physical delivery of the natural flow water which had been appropriated by and decreed to the United States, the opinion of the court stated:

> "In 1933, no natural flow water was delivered appellant district, whereupon appellant filed this *suit to require delivery to it of the natural flow water* to the extent of the capacity of the main canal, serving its district, which had been 1550 second feet."

The court in the opinion quoted from 43 USCA, Sec. 373, and stated: "If this suit be considered one for the enforcement of purely administrative duties, such *as the assessment of the charges of construction, the United States would not be a necessary party.*" The purpose of these suits is to vacate, set aside and annul certain illegal and void public notices and orders, which the petitioner seeks to enforce to collect $1,000,000.00 construction charges. Cer-

tainly if the United States is not a necessary party with reference to the assessment of the charges for construction legally made, it is not a necessary party with reference to restrain the illegal assessment of construction charges.

PUBLIC NOTICES AND ORDERS SOUGHT TO BE VACATED ARE A NULLITY.

Respondents take the position that the petitioner is bound by the provisions of Congressional legislation and that he must find statutory authority for the promulgation and enforcement of the public notices and orders in question, and in default of such warrant, he may be enjoined.

The case of United States vs. State of Arizona, 295 U. S. 174, was an action by the United States against the State of Arizona to enjoin interference by the state with the construction of the Parker Dam by the Secretary acting for the United States. Arizona used military force to stop the work. This court denied the injunction and stated: "It follows that the construction of the dam has not been authorized as required by the Reclamation law," and held that the Secretary had no authority to proceed.

The public notices and orders sought to be vacated are not authorized by the reclamation law, but are in positive violation of the express terms of that law, in four particulars, three of which are the most elementary and fundamental principles of *"the right to the use of water acquired"* by appropriation, which have been the settled law in the arid land states from the initiation of that doctrine to the present time, by rules, custom, legislation and judicial decisions, and recognized by Congress in the Act of July 26, 1866, and also in the Reclamation Act of June 17, 1902, and are also in violation of the Federal Constitution, legislation and judicial decisions of the State of Washington, because the effect of these notices and orders is to:

I. CHANGE THE MEASURE OF RESPONDENTS' RIGHT TO THE USE OF WATER FROM *"BENEFICIAL USE"* AS FIXED BY THE RECLAMATION LAW, CONTRACTS AND WATER RIGHT APPLICATIONS, LEGISLATION AND JUDICIAL DECISIONS OF WASHINGTON, CUSTOM AND PRACTICE ON ALL FEDERAL RECLAMATION PRO-

JECTS AND DETERMINATION MADE BY FORMER SECRETARY OF INTERIOR.

The purpose and effect of the public notices and orders sought to be vacated is to change the measure of a water right from *"beneficial use"* arbitrarily to three acre feet (Ottmuller 30, Fox 37) and three and one-half acre feet (Parks 29) for the basic public notice of October 17, 1930, contains the following order:

> "Notice is hereby given that as to all lands except those referred to in paragraph (c) (Parks land), during the year 1931 and subsequent years, until further notice, water deliveries in that district *will be limited to three (3) acre feet* per irrigable acre per year." (Fox 47, Ottmuller 44).

and to three and one-half acre feet on Parks land (Parks 29).

If these notices and orders sought to be vacated are enforced, the respondents Ottmuller and Parks will be deprived of about 40% of their water rights (2.56 acre feet in the Ottmuller case and 2.50 acre feet in the Parks case) the absolute title to which water right is vested in them and permanently attached to their lands (43 USCA 431) (Ottmuller 30,

Parks 29), and respondent Fox will be deprived of about 40% of the water right in which he has a vested interest (Fox 37).

(a) Sec. 8, Reclamation Act of June 17th, 1902 (43 USCA 372), in clear language makes *beneficial use* the yardstick with which to measure a water right on a Federal irrigation project in the following words:

> *"Water right appurtenant to land and extent of right. The right to the use of water* acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and *beneficial use shall be the basis, the measure,* and the limit of *the right."*

(b) All contracts and water right applications make beneficial use the measure of respondents' water rights.

Prior to the construction of the reservoirs and irrigation system by the United States, the respondents and other land owners were required to incorporate the Sunnyside Water Users Association, and place their lands in the project, and it was necessary for this association to enter into a contract with the United States (Fox 33, Ottmuller 25). This contract,

respondents' Exhibit "A" attached to the amended bills (Fox and Ottmuller 12 to 16, Parks 11 to 14) fixed beneficial use as the measure of the "right to the use of water" in the following words:

> "And to be based upon and *measured* and limited by the *beneficial use of water* * * * That in all the relations between the United States and this association and the members of the association, the *rights* of the members of the association *to the use of water where the same have vested, are to be defined, determined and enjoyed* in accordance with the provisions of said *Act of Congress* and other acts of Congress on the subject of *the acquisition and enjoyment of the rights to the use of water,* and also by the *laws of the State of Washington.*"

The water right application in the Fox case makes *beneficial use* as the measure of the right to the use of water, in the following words

> "The *measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof,* but in no case exceeding the share proportionate to irrigable acre-

age, of the water supply actually available as determined by the project manager or other proper officer of the United States, or of its successors in the control of the project, during the irrigation season for the irrigation of lands under said unit." (Fox 17).

The water right application in the Ottmuller case makes *beneficial use* the measure of the right to the use of water, in the following words:

"The quantity of water to be furnished hereunder shall be 3 acre feet of water per annum per acre of irrigable land, as aforesaid, measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided, that *the supply furnished shall be limited to the amount of water beneficially used on said irrigable land.*" (Ottmuller 16).

The supplemental water right contract in the Parks case makes *beneficial use* the measure of the right to the use of water, in the following words:

"The amount of water to be furnished hereunder shall be 3 acre feet of wa-

> ter per annum per acre, measured at the land, or *as much more water as will be required to successfully irrigate the land,* the amount so required to be determined by the authorized agent of the United States, and the water shall be used only to irrigate said lands and for domestic purposes incident thereto; provided, that the amount of water furnished shall be limited to the amount beneficially used upon such lands." (Parks 17).

It is evident from the express provisions of the various contracts and water right applications above referred to, that the measure of respondents' water rights is *beneficial use.* Regardless of the terms of those contracts and water right applications, the provision of the Reclamation Act which gives the measure of a water right on a Federal reclamation project (43 USCA 372) must be read into every contract and water right application with the same force as though expressly incorporated therein (California Oregon Power Co. vs. Beaver Portland Cement Co., 295 U. S. 142, 143) and if there is any conflict between the provision of the Reclamation Act giving the measure of

respondents' water rights and the water right applications and contract, then the Act of Congress prevails over the part of the contract or water right application which is in conflict therewith (Hipp vs. Prudential Gas Co., 244 N. W. 347).

(c) By legislation in the Territory and State of Washington, the measure of a water right by appropriation is the quantity of water necessary for the purpose of making the land available for agricultural purposes to the full extent of the soil.

By Act approved November 13, 1873 (Session Laws 1873, p. 520) the Legislature of Washington Territory fixed beneficial use as the basis and measure of the right to the use of water acquired by appropriation in Section 1, as follows:

> "That any person * * * who may have or hold a title or possessory right or title to any agricultural lands within the limits of Yakima County, Washington Territory, shall be entitled to the use and enjoyment of the waters of the streams or lakes in said county *for the purposes of irrigation and making said*

land available for agricultural purposes to the full extent of the soil thereof."

This act was continued in force by the Enabling Act (Rem. Rev. Stat. p. 343, 344, Section 24), which provides: "All laws in force, made by said territories, at the time of their admission in the Union, shall be in force in said states, except as modified or changed by this act or by the constitutions of the states, respectively." The Enabling Act made no change in this statute, neither was it modified or changed by the State Constitution (1889) and was continued in force by legislative enactment (Session Laws of 1889-90, p. 94) and continued to be the law with respect to the basis and measure of the water rights in Yakima County, where respondents lands are located (Ottmuller 25), for a period of fifty years and until similar provisions were enacted in the water code (Session Laws, Chap. 117), in Section 31 which provides: "That where the water applied for is to be used for irrigation purposes, *it shall become appurtenant* only to such land as may be reclaimed thereby, *to the full extent of the soil for agricultural purposes*" and in Sec. 39 which provides: *"The right to the use*

of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used." Both of the above provisions refer to natural flow and impounded waters.

A similar statute, with almost identical provision to Sec. 8 of the Reclamation Act with reference to the measure of a water right (43 USCA 372) was enacted in Utah in 1907 (Utah Compiled Law 1907, Sec. 1288x20), as follows: "Beneficial use shall be the basis, *the measure* and the limit *of all the rights to the use of water in this state.*" In the case of Salt Lake City vs. Gardner, 114 Pac. 147, the court in commenting upon the above statute stated:

> "The doctrine reflected in the foregoing statute has so often been declared the law, with respect to the appropriation of water during the last 25 years, that it has become elementary and is no longer questioned by anybody."

Similar statutes have been passed in a number of the arid land states. (Nev. Stat. 1903, page 24, Sec. 1, 1907, p. 30; N. M. Stat. 1907, Chap. 49, p. 71, Sec. 2; N. D. Stat. 1905, Chap. 34, Sec. 2; Rev. Code, 1905, Sec. 7604).

Although the State legislature of Washington gave the procedural requirements in connection with the acquisition of a water right (Session Laws 1889-90 p. 706; Session Laws 1891 p. 327), yet neither of the above statutes or any other statute enacted in Washington changed the rule fixing beneficial use as the basis and measure of the right to the use of water in Yakima County; and notwithstanding the provision with reference to the procedural requirements relative to acquisition of a water right by appropriation therein contained, the court held that the use of water for irrigation could be acquired by the actual beneficial use of the water upon the land without a compliance with the statutory requirements (In re Waters of Crab Creek and Moses Lake, 134 Wash. 7, 14, 15).

(d) The doctrine of appropriation for beneficial use as the test and measure of the water right is firmly established by the judicial decisions of the courts of the State of Washington, and arid land states and recognized by this court.

In Longmire vs. Smith, et als, 26 Wash. 439 (1901) suit was brought by Longmire against

Smith and others to quiet title to water appropriations made by him for the irrigation of farm land situate in Yakima County. Nearly all of the defendants were riparian owners upon the Wenas River. The court granted the decree quieting title and the question of the measure of the water right of Longmire was considered and the court stated:

> "It is an elementary principle of the law of appropritaion of water for irrigation that the first appropriator is *entitled to the quantity of water appropriated by him,* to the exclusion of subsequent claimants by appropriation or riparian ownership. When a valid appropriation is made, the right, according to all the authorities, becomes vested. There is an express reservation in all grants by the general government in favor of such rights. The legislature of Washington Territory in recognition and regulation of the right to the use of water in Yakima County, by act approved November 13th, 1873, defined the rights of appropriation."
>
> "Thus it will be seen that the *measure of the appropriation,* as defined by Section 1 of the Act November 13th, supra,

is the making of *said land available for agricultural purposes to the full extent of the soil thereof.*"

"However, the necessity of the issue presented is a definite measurement of the quantity of water required for the irrigation of these farm lands, and may be measured in inches where the pressure and method of measurement is given, or in the unit adopted by the statute. *The common experience in irrigating arid lands for agricultural crops in Yakima County would seem to afford a rule for the judicious application of water for lands herein. To such quantity of water the plaintiff is entitled by virtue of his prior appropriations.*"

From the experience of respondents and their predecessors in title, the amount of water required to make respondents' lands available for agricultural purposes to the full extent of the soil was ascertained by the representatives and subordinates of the Secretary "who had the physical charge of the water distribution, and from a factual investigation made by said representatives and subordinates by going upon the land from time to time, and the personal examination of the same, the

crops growing thereon, and the water requirements thereof," and from the information so obtained it was ascertained and determined by the Secretary that 4.84 acre feet for the Fox land, 5.56 acre feet for the Ottmuller land and 6 acre feet for the Parks land was required, which amount has been used thereon beneficially for more than twenty years (Fox 34, Ottmuller 27, Parks 26).

In California Oregon Power Co. vs. Beaver Portland Cement Co., 295 U. S. 142, where suit was brought by the power company to enjoin the cement company from interfering with the waters in Rogue River in the state of Oregon, the court stated, with reference to the act of July 26, 1866, Chap. 262, Section 9, 43 USCA Sec. 661, and Act of July 9, 1870, Chapter 235, Section 17, 43 USCA 661, as follows:

> "The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of *appropriation for a beneficial use,* as recognized by local rules and customs, and the legislation and judicial decisions of the arid land state, *as the test and measure of private rights* in and to the non-navi-

gable waters of the public domain * * * *as the exclusive criterion of the right to the use of water.*"

(e) By custom and practical construction, previous Secretaries of the Interior have ascertained the water requirements of respondents' and all other lands in Federal reclamation projects and fixed the same at the amount of water required to make the land available for agricultural purposes to the full extent of the soil.

The rule of law stated in the Act of July 26, 1866 (43 USCA 661), "*Whenever, by priority of possession, rights to the use of water* for mining, *agricultural,* manufacturing, or other purposes, have become *vested and accrued,* and the same are *recognized and acknowledged by local customs, laws and decisions of the courts,* the possessors and *owners of such vested rights shall be maintained and protected in the same,*" for this act reaches into the future and applies to the facts in these cases for several reasons. Fox has been in possession of and has enjoyed the right to the use of water to the extent of 4.84 acre feet, Ottmuller to the exent of 5.56 acre feet and Parks to the extent of

6 acre feet, which rights accrued by the application of water to respondents' lands more than twenty years ago (in re Waters of Crab Creek and Moses Lake, 134 Wash. 7) and became vested to the extent of the quantity of water used as soon as it was applied upon their lands (Longmire vs. Smith, 26 Wash. 439, 447) and became a part thereof (Ament vs. Bickford, 139 Wash. 494, 495) whether the water was from the natural flow or stored in a reservoir (Madison vs. McNeal, 171 Wash. 675) and appurtenant thereto (Geddis vs. Parish, 1 Wash. 587, 591), which rights were recognized by custom and practical construction of the Secretary of the Interior prior to August 13th, 1914, who, from information obtained from those charged with the physical distribution of water, ascertained the amount of water necessary to make respondents' lands available for agricultural purposes to the full extent of the soil, recognized the right of the respondents to the use of water from natural flow and impounded waters of the Yakima River to that extent, and respondents are entitled to be protected in such rights according to this custom, which had been generally followed on all Fed-

eral reclamation projects (Fox 34, 38, Ottmuller 26, 31, Parks 26, 30).

(f) Determination by Secretary of Interior prior to August 13, 1914, of respondents' right to the use of water acquired pursuant to contract.

The contract entered into between the predecessors of respondents and other water users through the Sunnyside Water Users Association of May 7, 1906, in paragraph 3 makes provision for the *"determination to be made upon due and expert consideration of all available data, and to be based upon and measured and limited by the beneficial use of the water."* Pursuant to this provision "it was determined by the * * * Secretary of the Interior" * * * that 4.84 acre feet of water for the Fox land (Fox 34), 5.56 acre feet of water for the Ottmuller land (Ottmuller 27) and 6 acre feet of water for the Parks land (Parks 27) was the measure of the amount required to make respondents' lands available for agricultural purposes to the full extent of the soil.

The identical proposition was before the court in Wilbur vs. Burley Irrigation District, 58 Fed. (2d) 871, which was an action by the

district against the Secretary of the Interior for a permanent injunction to restrain him from reconsidering the ratio of ownership and the participation of the Burley Irrigation District and the Minnidoka Irrigation District in the power profits, past and future. from what is known as the Minnidoka project. A former Secretary of the Interior had apportioned the costs and profits between the two districts. It was evident that it was the intention of the Secretary of Interior to change the determination so made. Suit was brought and injunction granted and the court stated:

> "The decision of Secretary Work became, in effect, a rule of property and is entitled to all the recognition which such a consequence necessarily gives it. It is obvious that if the rule were to be changed that the rights which the Burley Irrigation District believed that it was entitled to by reason of it, and on belief of the possession of which it undoubtedly had undertaken e x p e n s i v e improvements, would be destroyed or at least seriously disturbed."
>
> "It is clear, therefore, that any attempt on the part of the present Secretary to

revise, modify, or change these contracts or to interfere with property rights already vested, is a matter over which the jurisdiction of the Secretary no longer exists."

In Noble vs. Union River Logging Co., 147 U. S. 164, 176, where the question of the power of Secretary of Interior to annul the action of his predecessor was before the court, it stated: "A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of his property without due process of law, and was, therefore, void."

The reason why *beneficial use* has been the measure of the rights to the use of water since the initiation of the doctrine of the water right by appropriation by the miners in California after the gold strike in 1849 and has been constantly used and applied by local rules and customs and the legislation and judicial decisions of the arid land states, as the test and measure of the private rights, in and to the non-navigable waters, and declared to be "the measure * * * of the right to the use of water acquired under the reclamation law,"

and why this measure was definitely fixed by the Territorial legislature of Washington and has been consistently declared in subsequent legislation and decisions of the courts of that state, and declared to be the measure by this court (California Oregon Power Company vs. Beaver Portland Cement Co.) is because no other measure or yardstick is adequate to test and measure water rights for irrigation in the arid land states. The amount of water required to beneficially irrigate land is dependent upon and determined by many factors, such as the nature of the soil, whether sandy, gravelly, underlaid with hardpan, or a firm volcanic ash, contour of the land and whether it is level, rolling or uneven, and whether it is watered by subirrigation from irrigated lands at a higher level. The fact that the Fox land required 4.84 acre feet the Ottmuller 5. 56 acre feet, and the Parks land 6 acre feet, corroborates the foregoing statement.

After the measure of respondent Fox's water right had become fixed at 4.84 acre feet; Ottmuller at 5.56 acre feet and Parks at 6 acre feet, the petitioner has no right to curtail those rights, nor to substitute his judgment for the

will of Congress. Payne vs. Central Pacific Railroad Company, 255 U. S. 228, 236.

II. INCREASE THE CONSTRUCTION CHARGES AFTER THE SAME WERE FIXED BY PUBLIC NOTICE.

The then Secretary of the Interior, James Rudolph Garfield, pursuant to Sec. 4 of the Reclamation Act (43 USCA 419), estimated the cost of the purchase of the Sunnyside Canal, water appropriations, construction of reservoirs and irrigation system of sufficient capacity to successfully and beneficially irrigate all lands in the Sunnyside Division, including the lands of respondents and make said lands available for agricultural purposes to the full extent of the soil, and determined that $52.00 per acre would return to the reclamation fund the entire cost of the project. Thereafter and on March 2nd, 1909, he issued public notice and order covering these lands, fixing the construction charge at $52.00 per acre, which notice among other things provided:

> "The charges which shall be made per acre of irrigable land which can be irrigated by the waters from said irrigation project * * * the *building of the*

irrigation system $52.00 per acre of irrigable land." (Fox 33, 42, Ottmuller 26, 34).

Thereafter the predecessors in title of the Fox and Ottmuller lands made application for a water right (Fox and Ottmuller 16), which among other things provided that the applicant agrees "to pay for said water right the estimated cost of construction as fixed by the Secretary of Interior, namely the sum of $52.00 per acre," and the predecessor in title of the Parks land entered into a supplemental water right contract by the terms of which he agreed to pay $10.00 per acre for a supplemental water right (Parks 16).

Thereafter and prior to August 13th, 1914, reservoirs and irrigation system, together with water appropriations acquired from the Washington Irrigation Company, of sufficient capacity to furnish water rights to the extent of 4.84 acre feet for the Fox land, 5.56 acre feet to the Ottmuller land and 6 acre feet to the Parks land, and sufficient to beneficially and successfully irrigate all other lands in the Sunnyside division of the Yakima project, were constructed and completed, and *the right to the*

use of water acquired under the reclamation law to that extent became vested in respondents. Congress passed and the President approved on August 13th, 1914, the Reclamation Extension Act (Chap. 247, 38 Stat. 686) which among other things provided:

> "*No increase of the construction charges shall,* after August 13th, 1914, *be made, after the same have been fixed by public notice,* except by agreement between the Secretary of the Interior and a majority of the water right applicants and entrymen to be affected by such increase." (43 USCA 469).

On September 24th, 1914, Franklin K. Lane, the then Secretary of the Interior, pursuant to the terms of said act, issued a public notice and order which among other things, provided that there would be no increase in construction charges except as provided in the Reclamation Extension Act, which notice contains the following:

> "The *amount of the construction charge* per irrigable acre for lands for which entry under the provisions of the reclamation act of June 17th, 1902 (32 Stat. 388), or *water right applicants has*

> *heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed 'the building charge' and will not be increased* except as provided in said Reclamation Extension Act." (Fox 43, Ottmuller 40, Parks 34).

In 1930, Elwood Mead, Commissioner of Reclamation, recommended the construction of the Cle Elum reservoir at a cost of $3,500,000.00 to store water for the purpose of irrigating lands in the Kittitas Reclamation District, the canal and distribution system of said district being in the process of construction at that time, and for the purpose of furnishing water to irrigate lands in the Roza and Kennewick divisions of the Yakima project, the construction of which were contemplated at that time. He ascertained that the total cost of this reservoir would be $1,000,000.00 more than the amount which would be returned to the reclamation fund from the new divisions for which this reservoir was to be constructed. Without consulting respondents and other water users and officials of the Sunnyside Valley Irrigation District, he charged the sum of $1,000,000.00

to the Sunnyside division of the Yakima project and furnished the Secretary with information that provisions had been made for the payment of this sum. (Fox 35, Ottmuller 28, Parks 27).

Thereafter district counsel attempted to persuade the respondents and other water right applicants and water users in the Sunnyside Valley Irrigation District, to authorize the officials of the district to execute a contract with the United States to pay $1,000,000.00 additional construction charge and obligate respondents' lands and all other lands in said district to the last faithful acre to pay this sum. The respondents and other water users in the district refused to authorize this contract (Fox 36, Ottmuller 29, Parks 28). Thereafter it was agreed between the Secretary of the Interior, Commissioner of Reclamation and District Counsel that steps be taken to force and coerce the respondents and other water right applicants and water users in said district to either authorize the district to enter into contract and pay the sum of $1,000,000.00, or to force and coerce the respondents and other water right applicants and water users to sign a water rental appli-

cation or be deprived of a portion of *"the right to the use of water acquired"* and owned by them, unless they paid additional construction charges. In pursuance of this agreement they caused the Assistant Secretary of Interior on October 17th, 1930, to issue the basic public notice and order sought to be vacated, which public notice and order expressly provides that the water rental charges will be used to pay the costs of construction of the reservoir system, meaning the Cle Elum reservoir, and which notice contains the following provision with respect to the application of the water rental charges:

> *"All money* collected for the rental of such extra water *will be applied* to the payment of the unsecured portion of the *contsruction costs of the reservoir system* of the Yakima project." (Fox 47, Ottmuller 44, Parks 37).

On December 11th, 1930, the Secretary of the Interior certified to the President that the total costs of the construction of the Cle Elum reservoir was estimated at $3,500,000.00 and that $1,000,000.00 of this sum would be repaid by water rentals from the Sunnyside division of

the Yakima project, which certificate contains the following statement:

> "It is proposed to construct an earth-gravel fill storage dam located on the Cle Elum River, a tributary of the Yakima River * * * the total estimated cost $3,500,000.00 * * * of this amount * * * repayment of which will be provided as follows: * * * $1,000,000.00 *by rentals from the Sunnyside division of the Yakima project.*" (Fox 45, Ottmuller 41, Parks 35).

Pursuant to the public notices and orders sought to be vacated, Commissioner of Reclamation, District Counsel and Secretary of Interior caused respondents and other water users in the district to be notified that all water right applicants, including Fox and Ottmuller, would be required to pay a water rental for the right to the use of water in excess of 3 acre feet and that all supplemental water right contract holders, including Parks, would be required to pay for the right to the use of water in excess of 3½ acre feet, and required as a condition precedent of the enjoyment of the right to the use of water owned by respondents and other water users, in excess of these

amounts, the execution of a water rental application. (Fox 37, Ottmuller 30, Parks 29).

The Commissioner of Reclamation, District Counsel and Secretary of the Interior agreed with the representatives of the new divisions for which the Cle E l u m reservoir was constructed, that they would by means of said water rental applications force and coerce the respondents and other water right users to authorize the officials of the Sunnyside Valley Irrigation District to execute a contract to pay the United States the additional sum of $1,000,000.00 construction c h a r g e s, and-or collect from the respondents and other water right users of said unit by the subterfuge of the water rental applications, the sum of $1,000,000.00, and in the event they were unable by either of said methods to collect the same, then and in that event the new divisions for whose benefit said reservoir was constructed, would pay the same. (Fox 37, Ottmuller 30, Parks 29).

Since the promulgation of the orders and notices sought to be vacated it has been definitely ascertained by the Secretary of the Interior that the Cle Elum reservoir would cost

$1,003,000.00 less than the estimated cost made by the Secretary of Interior on December 11th, 1930, in his certificate to the President. The new districts, for whose benefit said reservoir was constructed have entered into contracts to pay additional large sums, and on account thereof there is no necessity for enforcing the orders sought to be vacated (Fox 39, Ottmuller 32, Parks 31).

If these public notices and orders sought to be vacated are permitted to stand, the respondents will be required to pay increased construction charges to the extent of about 35% of the original cost of their respective water rights and the money received will be used to pay construction costs for a reservoir constructed for the benefit of new divisions (Fox 36, Ottmuller 29, Parks 28).

III. STRIKE DOWN AND DESTROY WATER RIGHTS WHICH ARE APPURTENANT AND A PART OF RESPONDENTS' LANDS.

The contract between the Sunnyside Water Users Association and Secretary of Interior (Fox and Ottmuller 12, Parks 11) among other things, provides with reference to the water

rights to be acquired as follows: "*Which right shall be, and thereafter continue to be, forever appurtenant to the designated lands owned by such shareholders.*" The water right applications (Fox and Ottmuller 16) among other things provides: "The applicant hereby applies for a water right * * * with water supplied in pursuance thereof *to be used for the irrigation of and appurtenant to* applicant's land."

The respondent Ottmuller paid to the United States, the sum of $52.00 per acre in full payment of the construction charges (Ottmuller 28) and respondent Parks paid the United States $10.00 in full payment for a supplemental water right, and these respondents are "now the owners and holders of the fee simple title to said water right, sufficient to beneficially and successfully irrigate said land," to-wit: 5.56 acre feet Fox land and 6 acre feet Parks land of water per acre per annum; that said water right is appurtenant to the land herein described, and the absolute fee simple title to said land and water right is now vested in plaintiff (Ottmuller 28, Parks 27, and permanently attached to their lands (43 USCA 431). Respondent Fox has "paid to the United States

all sums that have accrued and become due on account of construction charges and has also paid all operation and maintenance charges assessed against the same, and that on account thereof the plaintiffs have a vested interest in a water right sufficient to beneficially irrigate said land, to-wit: 4.84 acre feet of water per acre per annum; that said water right is appurtenant to the land herein described." (Fox 35).

The effect of the public notice and order of October 17th, 1930 and other notices and orders sought to be vacated, is to strike down 2.56 acre feet of the Ottmuller water right, 2.50 acre feet of the Parks water right and 1.84 acre feet of the Fox water right, the absolute title in fee simple to the Ottmuller and Parks water right being vested in them, and Fox having a vested interest in a water right, which water rights are appurtenant to their respective lands.

The contract between the Sunnyside Water Users Association and Secretary of Interior (1906) expressly recognizes the fact that the lands to be irrigated are desert and arid and

have no value without water, for that contract contains the following statement:

> "Whereas, the lands embraced within the area proposed to be irrigated are naturally desert and arid and incapable of proper cultivation without irrigation unless the waters of the Yakima River in State of Washington, and its tributaries are impounded and the flow thereof regulated and controlled" (Fox and Ottmuller 12, Parks 11).

The court (Burbank Irrigation District No. 4 vs. Douglass, 143 Wash. 385) stated with reference to the arid lands in this state "for the land without water has no value." Three acre feet of water per acre per annum for Fox and Ottmuller land and 3½ acre feet for Parks land is not now, never has been and will not in the future, be sufficient to beneficially irrigate said lands, and would enable respondents to beneficially irrigate about one-half of their lands, leaving the other half thereof barren and nonproductive, forcing one-half to bear all construction and maintenance charges, taxes and assessments on his land. If respondents Fox and Ottmuller attempted to spread a maximum of three acre feet per acre and respondent

Parks attempted a spread a maximum of 3½ acre feet per acre over the whole tract of land, they would not have sufficient water to grow any profitable crop and their land would be completely destroyed for farming purposes, causing them to suffer irreparable loss and damage (Fox 38, Parks 30).

In Madison vs. McNeal, 171 Wash. 669, where the issue involved was the "right of the Madisons to a portion of certain waters produced by springs and dammed upon the property of McNeal and Wyatt, and to an alleged easement in the pipe line used in the delivery of such water," the court in commenting upon the rights of Madison to the water stored in the reservoir said:

> "That *the right to the flow of water to be used upon land, whether in its natural state or through pipes from a reservoir,* is treated as an incorporeal heriditament as distinguished from water alone, which is corporeal. * * * that water rights for the use upon the lands *are considered appurtenant to the land, and therefore, realty,* is declared by our statutes and prior decisions of this court. By the laws of 1891, page 328, it was

> provided that 'the right to the use of water acquired by appropriation may be transferred like other property by deed.' By the water code of 1917, Rem. Rev. Stat. Section 7391, 'the right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used * * * ' * * * Hence, we conclude that we are not here dealing with *water as personal property,* but rather with an alleged *water right as real property.*"

The water rights to the extent of 4.84 acre feet on the Fox land, 5.56 acre feet on the Ottmuller land, and 6 acre feet on the Parks land became vested and as much a part of the soil as the houses, barns and other improvements placed thereon, or in the words of the Reclamation Act (43 USCA 372) *"shall be appurtenant to the land irrigated."*

In Ament vs. Bickford, 139 Wash. 494, the predecessor in title of Bickford had sold to predecessor in title of Ament a parcel of land and a perpetual water right, which required the purchaser to pay annually a certain sum for the use of the system. After many years

use, the successor in ownership of Bickford destroyed the water connection and shut off the supply. The court in commenting upon it said: "The appellant b o u g h t a *water right* which was intended to, and *did, become a part of the land.* * * * the contract did more than create covenants; *it transferred property.* * * * The *purchase was not of water from a water system, but of a certain definite water right.*"

To the same effect is the case of Dickinson vs. Dick, 151 Pac. 441, where an attorney had performed legal services for reservoir companies and accepted water rights in payment for his services. The companies became insolvent and a receiver was appointed who attempted to disregard the water right contracts on the theory that they were executory and burdensome upon the estate. The court in commenting upon it stated:

> "The contracts of plaintiff in error are not executory in their character, but the objects itself are fully performed prior to the appointment of the receiver. The corporation severally sold and received full compensation for perpetual water

rights, and delivered the same to the respective purchaser, thus investing the latter with dominion over the thing with which the former parted. Fletcher vs. Peck, 3 L. ed. 162."

"The making of the agreement, plaintiff and the construction company and its complete performance by the plaintiff, resulted in an executed contract transferring to plaintiff real property. 3 Kinney on Irrigation Sec. 1520, Consolidated Ditch Company vs. Old, 163 Pac. 78, Edinburg vs. Pachen, 235 S. W. 1088."

The reason why the Reclamation Act declares "that the right to the use of water acquired under the provisions of this act *shall be appurtenant to the land irrigated,* and beneficial use shall be the basis, the measure and the limit of the right" and the courts of Washington have consistently held that a water right is realty and appurtenant to the land, and the legislature and judicial decisions of the arid land states are to the same effect, is because the right to the use of water or water rights in the arid land states of the West is the foundation upon which all values of agricultural lands are based and consequently practically

all the values in cities and towns which have sprung up as a result of the reclamation of the arid lands by irrigation. Using the words of the Reclamtaion Act, "the right to the use of water acquired for irrigation is 'the basis' or foundation upon which rests all the development and all of the wealth which has transformed many sections of the arid West into happy and prosperous homes and farmsteads upon the land thus reclaimed, and cities and towns have sprung up and are dependent upon the protection of this right.

The farmer takes the land in its natural state, covered with sagebrush, with uneven surface and with depressions and draws through the same, which reqiures a vast amount of labor in removing the sagebrsuh and leveling the land so that water will flow over it in rills without leaving pools of water standing thereon. It is also necessary for him to construct ditches, flumes, pipe lines and other water conduits to carry the water to and distribute the same thereon for irrigation purposes, also a house, barn, outbuildings, fences and other improvements to make a complete farmstead. In most cases, the farmer does not have sufficient cap-

ital to make all these improvements and it is necessary for him, when his land is partly improved to place a mortgage thereon in order to get sufficient funds to complete the improvement. The loan is obtained from Federal Land Bank or Land Bank Commissioner, not upon the value of the land, which has no value without water, but upon the value of the water right which is a part of the land and which gives it value. The construction charges paid by the farmer for the construction of the artificial means to bring the water to the land, designated in Act as "construction charges," is but a small portion of the cost to respondents in making their land into complete farmsteads.

The reclamation law, which requires the construction charges to be "determined with a view of returning to the reclamation fund the estimated cost of construction" (43 USCA 461), which gives a lien in favor of the United States for all charges so fixed (43 USCA 542), and which requires the Secretary upon full payment of the construction charges to "issue upon request" a certificate certifying that payment of all building and betterment charges

in full has been made and the lien upon the land has been so far satisfied and is no longer of any force or effect (43 USCA 543), and that "no such right shall permanently attach until all payments therefor are made" (43 USCA 431) and "that when the payments required by this act are made for the major portion of the lands irrigated from the waters or works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense" (43 USCA 498), and that "whenever two-thirds of the irrigable area of any project, or division of a project shall be covered by water right contracts between the water users and the United States, said project shall be required to take over through a legally organized irrigation district, the care, operation, and maintenance of all of or any part of the project works," conclusively show that it was not the intention of Congress that the United States would acquire either the *water* or *water right* or the works of the project or that the United States would sell and respondents would purchase under executory contracts water to irrigate their lands, or

that the United States would continue to operate the irrigation system after it was a going concern and sufficient payment had been made on construction charges to protect the United States or after a contract had been entered into wih an irrigation district, comprising the division under the state law, which had agreed to pay the construction charges. It certainly would be very unusual for the United States to require a mortgage as security for all moneys advanced and then have title to the property acquired by such moneys after the mortgage was paid.

IV. VIOLATE THE FUNDAMENTAL DOCTRINE AND PROPERTY MAXIM OF WATER RIGHTS BY APPROPRIATION *"FIRST IN TIME, FIRST IN RIGHT"* WHICH THE SECRETARY OF INTERIOR IS REQUIRED TO OBSERVE IN CARRYING OUT THE PROVISIONS OF THE RECLAMATION LAW.

The basic public notice and order of October 17th, 1930, gives the reason for the promulgation and enforcement of this order and subsequent orders in the following language:

> "The *Kittitas division is now beginning the use of water to which it is en-*

> *titled under the contract between the Kittitas Reclamation District and the Unied States* and it has now become necessary to limit water deliveries in the Sunnyside Valley Irrigation District * * * notice is hereby given * * * that during the year 1931 and subsequent years, until further notice, water deliveries in that district will be limited to three acre feet per irrigable acre per year * * * provided, however, *so long as there is surplus stored water available and not required to meet the contract obligations* of the United States to other parties, water in excess of 3 acre feet may be rented by water users of the Sunnyside Valley Irrigation District * * *." (Fox 47, Ottmuller 44, Parks 37).

From the foregoing statement, it is evident that the purpose of the public notices and orders sought to be vacated was to take away the right to the use of water acquired to the extent of 1.84 acre feet from the Fox land, 2.56 acre feet from the Ottmuller land and 2.50 acre feet from the Parks land, where the same had been used for more than twenty years and to give those rights to lands in the Kittitas Reclamation District. This is in positive violation of the

express terms of the reclamation law which provides:

> "Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided *in excess of the requirements of the lands to be irrigated under any project,* the Secretary of the Interior, *preserving a first right* to lands and entrymen under the project, is hereby authorized, * * * to contract for the impounding, storage, and carriage of water *to an extent not exceeding such excess capacity* with irrigating systems operating under Section 14 of this title * * * and Irrigation Districts" (43 USCA 523).

This section expressly commands the Secretary in carrying out the provisions of the reclamation law, to recognize and follow the fundamental and elementary rule which gives stability to property rights and which has been uniformly recognized by custom, legislation and judicial decisions of the arid land states since the initiation of the right to the use of water by appropriation until the present time; and is in harmony with the express terms of

Section 3 of the contract between the Sunnyside Water Users' Association and Secretary of May 7, 1906, which provides that the total acreage for which rights to the use of water shall be issued *"shall, in no event"* exceed the amount of water available from all sources, measured by beneficial use.

Section 4 and Section 11 of Act approved November 13th, 1873 (Session Laws 1873, page 520); also act approved March 9th, 1891, Sec. 1 (Session Laws 1891, Chapter 142) and the water code approved March 14th, 1917 (Session Laws 1917, Chapter 117, Sec. 1) expressly declare the law that "as between appropriations, the *first in time shall be the first in right.*"

In the case of Longmire vs. Smith, 26 Wash. 439 (1901) suit was b r o u g h t by Longmire against Smith to quiet title to water appropriated by him for the irrigation of farm lands, and the issue involved was whether he was entitled to water for the irrigation of the entire tract as of the date of the original appropriation upon which issue the court held in his favor and stated:

"It is an elementary principal of the

law of appropriation of water for irrigation that the *first appropriator is entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants by appropriation* or riparian ownership. When a valid appropriation is made, the right, according to all the authorities, becomes vested."

This doctrine was first recognized and declared in the case of Irwin vs. Phillips, 5 Cal. 140 (1855). The court stated:

"There are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of res judicata. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and *the rights of those who, by prior appropriation, have taken the waters from the natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers,* and without which the most important interests of the mineral region would remain without development * * * it has equally conferred *the right*

> *to divert the streams from their natural channels,* and as these two rights stand upon an equal footing when they conflict, *they must be decided by the fact of priority.*"

In Willey vs. Decker, 11 Wyo. 1146, 73 Pac. 210 (1903) the issues involved were water rights based upon appropritaion, the court stated:

> "It will be observed that the doctrine of prior appropriation is established as a rule of imperative necessity, and the outgrowth of the custom of the earlier settlers upon the public lands for the purpose of mining and rendering the soil available for cultivation. The doctrine was first recognized by Congress in 1866 by Act of July 6th of that year."

Public notices and orders sought to be vacated override the provisions in the reclamation law which makes beneficial use the measure; that forbids increase in construction charges; that makes the water right appurtenant to the land and provides "first in time, first in right," thereby depriving the respondents of property rights in violation of the Federal Constitution, State Constitution, legisla-

tion and judicial decisions of the State of Washington, and contracts and water right applications, under which respondents have *"the right to the use of water acquired under the provisions of the reclamation law."*

THE ACTION OF THE TRIAL AND APPELLATE COURT IN DENYING PETITIONER'S MOTION TO DISMISS CONSTITUTES A PROPER EXERCISE OF JURISDICTION AND JUDICIAL FUNCTION.

The cases of Wells vs. Roper, Transcontinental and Western Air vs. Farley; Boeing Air Transport vs. Farley and United States ex rel Shoshone Irrigtaion District vs. Ickes, cited and strongly relied upon by the petitioner are clearly distinguishable from these suits for the reasons, first, in those suits the plaintiff sought to control the discretion and judgment of the executive officer on matters entrusted to him by Congress, second, involved the breach of a contract by the United States. Congress had entrusted the matters involved to the discretion of the Postmaser General in the first three cases and Secretary of the Interior in the last case and the executive official was acting with-

in the statutory authority and jurisdiction so entrusted to him in discretionary matters and because of that fact the courts had no jurisdiction to interfere.

Neither of these elements exist in these suits. The difference between the illegal seizure of the property and cancellation of a contract is clearly pointed out in Goltra vs. Weeks, 271 U. S. 536, in which case the court stated:

> "The difference between an injunction against the illegal seizure of property lawfully possessed and against the cancellation of a contract, which involved no change of possession, is manifest."
>
> "The bill was suitably framed to secure the relief from an alleged conspiracy of the defendants without lawful right to take away from the plaintiffs the boats of which by lease or charter, he alleged that he had acquired the lawful possession and enjoyment for a definite period of five years. He was seeking equitable relief to avoid a threatened trespass upon that property by persons who were government officers. If it was a trespass, then the officers of the government should be restrained, whether

> they profess to be acting for the Government or not. Neither they nor the Government they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceedings by a court of competent jurisdiction, even though the United States for whom they may profess to act is not a party and cannot be made one. *By reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing them in asserted agency for the government.*"

In Ballinger vs. United States, 216 U. S. 240, 54 L. ed. 464, which was a suit for mandamus to compel the Secretary of Interior to cause to be delivered, a patent to an Indian Allottee, in accordance with law, the court stated:

> "Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, *he,*

as all others, is bound by the provisions of congressional legislation."

In the case of Miguel vs. McCarl, 261 U. S. 442, 78 L. ed. 901, suit was brought against the Comptroller General to enjoin him from interfering with the payment to petitioner, of retired pay and allowances, and the court stated:

> "Mandatory injunction prayed for is in effect equivalent to a writ of mandamus and governed by like considerations. In this situtaion the duty of the disbursing official to pay the voucher in question is so plainly prescribed as to be free from doubt and equivalent to a positive command, and therefore, is so far ministerial that its performance may be compelled by mandamus."

In American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94, 47 L. ed. 90, the Postmaster at Nevada, Missouri, pursuant to order from the Postmaster General, refused to deliver to the plaintiff, mail to which it was entitled. Suit was brought for an injunction to prevent the enforcement of the orders. The court in commenting upon the order under which the Postmaster was acting, said:

> "His right to exclude the letters, or to

> refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. * * * Otherwise, the individual is left to the absolutely untrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and, in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld."

In Payne vs. Central Pacific Railway, 255 U. S. 228, 65 L. ed. 598, suit was brought to enjoin the Secretary of Interior and Commissioner of the General Land Office, from cancelling a selection of indemnity lands under a railroad land grant. The court stated:

> "We are asked to say that this is a suit against the United States, and therefore not maintainable without its consent; but we think the suit is one to restrain the appellants from cancelling a valid indemnity selection through a mistaken conception of their authority, and thereby casting a cloud upon the plaintiff's

title. Philadelphia Company vs. Stimson, 223 U. S. 605, 619, 20, 56 L. ed. 570, 576, 577; Lane vs. Watts, 234 U. S. 525, 540, 58 L. ed. 1440, 1456."

In the case of Garfield vs. Goldsby, 211 U. S. 249, action was brought for the writ of mandamus against the Secretary of the Interior in his official capacity to require him to erase certain marks and notations theretofore made by his predecessor in office upon the rolls, striking therefrom the name of the relator, Goldsby, as an approved member of the Chickisaw Nation and to restore her to enrollment as a member of the Nation. The court granted the mandatory injunction and stated:

"The right to be heard before property is taken, or rights or privileges withdrawn, which have been previosuly legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which the principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court * * *. There is *nothing in the statutes as we read them, which gave the Secretary power and authority without notice*

and hearing, to strike down the rights thus acquired."

The last expression of this court upon this question was Ickes vs. Virginia Colorado Development Company, 295 U. S. 639, which was a suit "to obtain a mandatory injunction against the Secretary of the Interior to require him to vacate certain adverse proceedings and his decision declaring certain placer claims of the plaintiff to be void," the court stated: "The Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law" and sustained the decree of lower courts where the identical question involved in these suits was before the court.

Using the language and thought of the court in United States vs. Lee, 106 U. S. 197, 27 L. ed. 171, 182, the respondents respectfully ask, "Shall it be said, in the face of all this, and the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give a remedy when the respondents have been deprived of their *'right*

to the use of water acquired under the reclamation act" pursuant to the constitution, legislation and judicial decisions of the State of Washington, their rights 'seized and converted to the use of the Government' for *'the Kittitas division which is now beginning the use of water to which it is entitled under the contract between the Kittitas Reclamation District and the United States'* (Parks 37) 'without any lawful authority, without any process of law and without compensation,' (without any hearing and without heeding a joint memorial of the Legislature of the State of Washington. Fox 40), because the Secretary of the Interior has issued public notices and orders denying them these rights, which are guaranteed to them by the Constitution of the United States?"

The abritrary and capricious action in the promulgation of the notices and orders to force and coerce the payment by respondents and other water users of $1,000,000.00 of the cost of construction of the Cle Elum reservoir for new divisions with an agreement between the executives in charge of the administration of the reclamation law and the officials of the districts comprising the new divisions that in

the event payment could not be enforced, then the new divisions would pay the same, reached the climax when the petitioner refused to grant respondents and other water users a hearing and ignored a joint memorial of the legislature of the State of Washington (Fox 41), and is conclusive proof that the petitioner is not exercising good faith or an honest judgment. The nearest approach to a similar situation was presented to this court in Sterling vs. Constantine, 287 U. S. 378, where the Governor of Texas took a similar position, and asserted as the petitioner asserts in these cases, that the court is powerless to grant relief, but this court held that the Constitution of the United States and not the edict of the Governor was the Supreme Law of the Land.

CONCLUSION

For the reasons which have been set forth in the foregoing, it is respectfully submitted that the judgments below are correct and should be affirmed.

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December 21st, 1936

APPENDIX

TITLE 43, UNITED STATES CODE ANNOTATED

SEC. 371. *Definitions: "Secretary," "reclamation law," "reclamation fund," "project,"* and *"division of a project."* When used in this chapter—

(a) The word "Secretary" means the Secretary of the Interior.

(b) The words "reclamation law" mean the provisions of this chapter.

(c) The words "reclamation fund" mean the fund provided by the reclamation law.

(d) The word "project" means a Federal irrigation project authorized by the reclamation law.

(e) The words "division of a project" mean a substantial irrigable area of a project designated as a division by order of the Secretary. (Dec. 5, 1924, c. 4, Sec. 4, subsec. A, 43 Stat. 701; Feb. 21, 1925, c. 277, Sec. 1, 43 Stat. 956.)

SEC. 372. *Water right as appurtenant to land and extent of right.* The right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land ir-

rigated, and beneficial use shall be the basis, the measure, and the limit of the right. (June 17, 1902, c. 1093, Sec. 8, 32 Stat. 390.)

SEC. 412. *Prerequisites to initiaion of project or division of project.* After December 5, 1924, no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States. (Dec. 5, 1924, c. 4, Sec. 4, subsec. B, 43 Stat. 702.)

SEC. 413. *Approval of project by President.* No irrigation project shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States. (June 25, 1910, c. 407, Sec. 4, 36 Stat. 836.)

SEC. 419. *Contract for irrigation project; notice as to lands irrigable, unit of entry, and construction charges.* Upon the determination that any irrigation project is practicable, the Secretary of the Interior may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irirgation project, and the number of annual installments in which such charges shall be paid and the time when such payments shall commence: Provided, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be

employed thereon. (June 17, 1902, c. 1093, Sec. 4, 32 Stat. 389.)

SEC. 461. *Determination of construction charges generally.* The construction charges which shall be made per acre upon the entries and upon lands in private ownership which may be irrigated by the waters of any irrigation project shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably. (June 17, 1902, c. 1093, Sec. 4, 32 Stat. 389.)

SEC. 469. *Increase in construction charges.* No increase in the construction charges shall, after August 13, 1914, be made, after the same have been fixed by public notice, except by agreement between The Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase, whereupon all water-right applicants and entrymen in the area proposed to be affected by the increased charge shall become subject thereto. Such increased charge shall be added to the construction charge and payment thereof distributed over the remaining unpaid

installments of construction charges: Provided, That the Secretary of the Interior, in his discretion, may agree that such increased construction charge shall be paid in additional annual installments, each of which shall be at least equal to the amount of the largest installment as fixed for the project by the public notice theretofore issued. And such additional installments of the increased construction charge, as so agreed upon, shall become due and payable on December 1 of each year subsequent to the year when the final installment of the construction charge under such public notice is due and payable: Provided further, That all such increased construction charges shall be subject to the same conditions, penalties, and suit or action as provided in sections 478, 480, and 481 of this chapter. (August 13th, 1914, c. 247, Sec. 4, 38 Stat. 687.)

SEC. 500. *Duty of association or district to take over management.* Whenever two-thirds of the irrigable area of any project, or division of a project, shall be covered by water-right contracts between the water users and the United States, said project shall be required, as a

condition precedent to receiving the benefits of this chapter, to take over, through a legally organized water-users' association or irrigation district, the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as the Secretary may prescribe, and thereafter the United States, in its relation to said project, shall deal with a water-users' association or irrigation district, and when the water-users assume control of a project, the operation and maintenance charges for the year then current shall be covered into the construction account to be repaid as part of the construction repayments. (Dec. 5, 1924, c. 4, Sec. 4, subsec. G, 43 Stat. 702.)

SEC. 511. *Authority to contract with irrigation district.* In carrying out the purposes of the reclamation law, the Secretary of the Interior may enter into contract with any legally organized irrigation district whereby such irrigation district shall agree to pay the moneys required to be paid to the United States, and in such event water-right applications on the part of the landowners and entrymen, in the

discretion of the Secretary of the Interior, may be dispensed with. In the event of such contract being made with an irrigation district, the Secretary of the Interior, in his discretion, may contract that the payments, both for the construction of irrigation works and for operation and maintenance, on the part of the district shall be made upon such dates as will best conform to the district and taxation laws of the respective States under which such irrigation districts shall be formed, and if he deem it advisable he may contract for such penalties or interest charges in case of delinquency in payments as he may deem proper and consistent with such State laws, notwithstanding the provisions of sections 471, 475, 478, 492 and 497 of this chapter. The Secretary of the Interior may accept a partial payment of the amount due from any district to the United States, providing such acceptance shall not constitute a waiver of the balance remaining due nor the interest or penalties, if any, accruing upon said balance: Provided, That no contract with an irrigation district under this and the two following sections shall be binding on the United States until the proceedings on the part of the

district for the authorization of the execution of he contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid. (May 15, 1922, c. 190, Sec. 1, 42 Stat. 541.)

SEC. 512. *Release of Government liens after contract with irrigation districts.* Patents and water-right certificates which shall be issued after May 15, 1922, under the terms of sections 541 to 546, inclusive, of this chapter, for lands lying within any irrigation district with which the United States shall have contracted, by which the irrigation district agrees to make the payment of all charges for the building of irrigation works and for operation and maintenance, shall not reserve to the United States a lien for the payment of such charges; and where such a lien shall have been reserved in any patent or water-right certificate issued under the said sections, the Secretary of the Interior is hereby empowered to release such lien in such manner and form as may be deemed effective; and the Secretary of the Interior is further empowered to release liens in favor

of the United States contained in water-right applications and to assent to the release of liens to secure reimbursement of moneys due to the United States pursuant to water-right applications running in favor of the water-users' association and contained in stock subscription contracts to such associations when the lands covered by such liens shall be subject to assessment and levy for the collection of all moneys due and to become due to the United States by irrigation districts formed pursuant to State law and with which the United States shall have entered into contract therefor: Provided, That no such lien so reserved to the United States in any patent or water-right certificate shall be released unil the owner of the land covered by the lien shall consent in writing to the assessment levy and collection by such irrigtaion district of taxes against said land for the payment to the United States of the contract obligation: Provided further, That before any lien is released under this section the Secretary of the Interior shall file a written report finding that the contracting irrigation district is legally organized under the laws of the State in which its lands are located, with full power

to enter into the contract and to collect by assessment and levy against the lands of the district the amount of the contract obligation. (May 15, 1922, c. 190, Sec. 2, 42 Stat. 542.)

SEC. 542. *Reservation of lien for charges; enforcement of lien; redemption.* Every patent and water-right certificate issued under the preceding section shall expressly reserve to the United States a prior lien on the land patented or for which water-right is certified, together with all water-rights appurtenant or belonging thereto, superior to all other liens, claims or demands whatsoever for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water-rights.

Upon default of payment of any amount so due title to the land shall pass to the United States free of all encumbrance, subject to the right of the defaulting debtor or any mortgagee, lien holder, judgment debtor, or subsequent purchaser to redeem the land within one year after the notice of such default shall have been given by payment of all moneys due, with

8 per centum interest and cost. And the United States, at its option, acting through the Secretary of the Interior, may cause land to be sold at any time after such failure to redeem, and from the proceeds of the sale there shall be paid into the reclamation fund all moneys due, with interest as herein provided, and costs. The balance of the proceeds, if any, shall be the property of the defaulting debtor or his assignee: Provided, That in case of sale after failure to redeem under this section the United States shall be authorized to bid in such land at not more than the amount in default, including interest and costs. (Aug. 9, 1912, c. 278, Sec. 2, 37 Stat. 266.)

SEC. 543. *Certificate of final payment and release of lien.* Upon full and final payment being made of all amounts due on account of the building and betterment charges to the United States or its successors in control of the project, the United States or its successors, as the case may be, shall issue upon request a certificate certifying that payment of the building and betterment charges in full has been made and that the lien upon the land has been so far satisfied and is no longer of any force

or effect except the lien for annual charges for operation and maintennace. (Aug. 9, 1912, c. 278, Sec. 3, 37 Stat. 266.)